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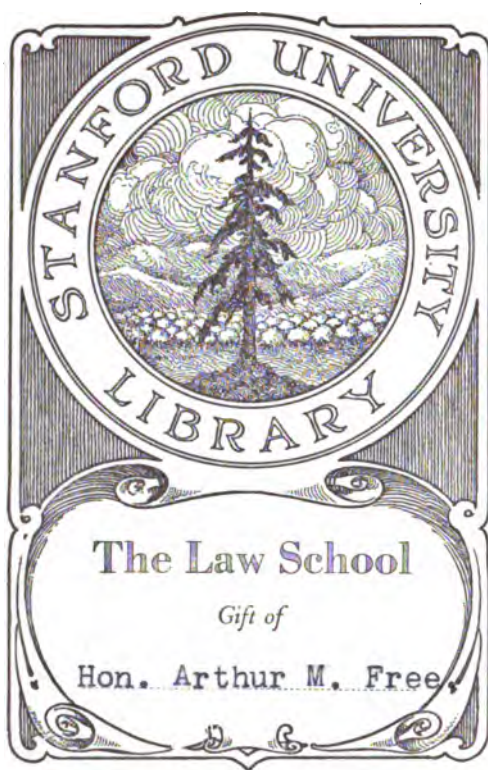
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COURT OF CUSTOMS APPEALS REPORTS

VOLUME 5

CASES ADJUDGED
IN THE UNITED STATES COURT
OF CUSTOMS APPEALS

DECEMBER, 1913, TO MARCH, 1915

THOMAS H. CLARK
Reporter

WASHINGTON
1915



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YRABLU GROBATE

UNITED STATES COURT OF CUSTOMS APPEALS.

Presiding Judge:

Honorable ROBERT M. MONTGOMERY.

Associate Judges:

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Honorable ORION M. BARBER.

Honorable MARION DE VRIES.

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¹ Resignation effective June 5, 1914.

TABLE OF CASES REPORTED.

| | Page. | | Page. |
|--|-------|--|-------|
| Abraham & Straus v. United States..... | 311 | General Electric Co. v. United States..... | 528 |
| Altman & Co. v. United States..... | 170 | Gibson Art Co. v. United States..... | 385 |
| Altman & Co. v. United States..... | 206 | Goat & Sheepskin Import Co. et al. v. | |
| Altman & Co. v. United States..... | 412 | United States..... | 178 |
| Amendola, United States v..... | 516 | Grasselli Chemical Co., United States v..... | 320 |
| America Glue Co. v. United States..... | 36 | Gredelus, United States v..... | 298 |
| American Bead Co. v. United States..... | 459 | Gufterman, Rosenfeld & Co. v. United States..... | 514 |
| American Express Co., United States v..... | 125 | Hamburger Levine Co., United States v..... | 217 |
| American Express Co., United States v..... | 351 | Hampton, Jr., & Co. v. United States..... | 51 |
| American Railroad Co. of Porto Rico, United | | Hampton, Jr., & Co. v. United States..... | 163 |
| States v..... | 474 | Hecht & Co. v. United States..... | 261 |
| American Smelting & Refining Co., United | | Henderson, United States v..... | 62 |
| States v..... | 398 | Hensel, Bruckmann & Lohrbacher v. United | |
| Armstrong Cork Co., United States v..... | 404 | States..... | 481 |
| Atlantic Transport Co. v. United States..... | 373 | Hensel, Bruckmann & Lohrbacher, United | |
| Atwood-Stone Co. v. United States..... | 472 | States v..... | 552 |
| Austin, Nichols & Co. et al. v. United States..... | 167 | Herz & Co. et al. v. United States..... | 547 |
| Badische Co. et al., United States v..... | 226 | Hirshbach & Smith v. United States..... | 124 |
| Balz & Co., United States v..... | 319 | Hogan, United States v..... | 1 |
| Bartley Bros. & Hall, United States v..... | 249 | Hollender & Co. et al. v. United States..... | 198 |
| Batten & Co. v. United States..... | 447 | Hunter & Co. et al. v. United States..... | 32 |
| Bausch & Lomb Optical Co., United States v..... | 416 | Isler & Guye et al. v. United States..... | 229 |
| Bayersdorfer & Co., United States v..... | 99 | Iwakami & Co. v. United States..... | 244 |
| Bernard, Judae & Co., United States v..... | 202 | Johns-Manville Co., United States v..... | 404 |
| Blumenthal & Co. v. United States..... | 327 | Kagawa & Co., United States v..... | 388 |
| Boye Needle Co. v. United States..... | 43 | Kaufmann & Co. et al. v. United States..... | 117 |
| Bradshaw & Co., United States v..... | 121 | Klipstein & Co., United States v..... | 28 |
| Brown & Co., United States v..... | 212 | Kraemer & Co. v. United States..... | 66 |
| Brown & Co. v. United States..... | 396 | Kraemer & Co. v. United States..... | 479 |
| Burley & Tyrrell Co., United States v..... | 401 | Kraemer & Co. et al., United States v..... | 294 |
| Bush & Co. et al., United States v..... | 127 | Kronfeld, Saunders & Co. et al. v. United | |
| Buss & Co., United States v..... | 110 | States..... | 222 |
| Castle, Gotthell & Overton, United States v..... | 366 | Kurtz, Stubbeck & Co., United States v..... | 144 |
| Chee Chong & Co. et al. v. United States..... | 556 | Kuyper & Co. v. United States..... | 175 |
| Chrystal v. United States..... | 489 | La Montagne's Sons v. United States..... | 523 |
| Cohn & Rosenberger v. United States..... | 339 | Landay Bros. v. United States..... | 498 |
| Colonial Import & Export Co. v. United | | Lang v. United States..... | 199 |
| States..... | 137 | Lang v. United States..... | 362 |
| Cone et al. v. United States..... | 491 | Lang et al. v. United States..... | 85 |
| Cornett, United States v..... | 334 | Langley et al. v. United States..... | 76 |
| Davies, Turner & Co. et al., United States v..... | 196 | Larzelere & Co. v. United States..... | 510 |
| De Jongre et al. v. United States..... | 134 | Laurentide Paper Co., United States v..... | 519 |
| Denike v. United States..... | 364 | Lehman Co. v. United States..... | 441 |
| Durbrow & Hearne Manufacturing Co., | | Levy & Levis Co. v. United States..... | 89 |
| United States v..... | 410 | Lewisohn Importing & Trading Co. v. United | |
| Eckstein, United States v..... | 315 | States..... | 204 |
| Edson Keith & Co., United States v..... | 82 | Lines & Warne, United States v..... | 552 |
| Elgin National Watch Co., United States v..... | 336 | Lorsch & Co. et al. v. United States..... | 93 |
| Fearon Daniel Co., United States v..... | 500 | McCoy, United States v..... | 264 |
| Fensterer & Ruhe et al. v. United States..... | 61 | McNaughton, United States v..... | 114 |
| Fenton, Jr., United States v..... | 173 | Maniscalco v. United States..... | 49 |
| Field et al. v. United States..... | 477 | Marshall, Field & Co. v. United States..... | 194 |
| Fischer v. United States..... | 301 | Masson, United States v..... | 77 |
| Flatt & Co., United States v..... | 210 | Masson, United States v..... | 307 |
| Frank & Co. et al. v. United States..... | 273 | Meadows & Co., United States v..... | 532 |
| Gallagher & Ascher et al. v. United States.... | 59 | Meier & Frank Co., United States v..... | 208 |

| | Page. | | Page. |
|---|-------|--|-------|
| Marok & Co. v. United States..... | 347 | Sheldon & Co., United States v..... | 371 |
| Miloheln Tire Co. v. United States..... | 91 | Sheldon & Co., United States v..... | 421 |
| Miller & Tokstad, United States v..... | 256 | Sheldon & Co., United States v..... | 427 |
| Mills & Duflot, United States v..... | 534 | Smith & Co. v. United States..... | 40 |
| Moos & Co., United States v..... | 322 | Smith & Co. v. United States..... | 523 |
| Moos & Co. et al., United States v..... | 256 | Spanish River Pulp & Paper Mills, United States v..... | 225 |
| Myers & Co. et al., United States v..... | 541 | Spingarn Bros., United States v..... | 2 |
| National Hat Fin Co. v. United States..... | 435 | Stegaman, Jr., v. United States..... | 393 |
| Neustadt, United States v..... | 283 | Stiner & Son et al. v. United States..... | 246 |
| Nevin v. United States..... | 423 | Stirn v. United States..... | 47 |
| Nightingale, United States v..... | 79 | Stirn, United States v..... | 140 |
| Nosaki Bros., United States v..... | 286 | Strauss & Sons et al., United States v..... | 147 |
| Olympic Club, United States v..... | 251 | Strauss & Sons et al., v. United States..... | 147 |
| Overton & Co. v. United States..... | 183 | Strohmeyer & Arpe Co., United States v..... | 256 |
| Petry Co. v. United States..... | 524 | Strohmeyer & Arpe Co. v. United States..... | 331 |
| Post Fish Co., United States v..... | 130 | Strohmeyer & Arpe Co. v. United States..... | 537 |
| Proctor Co., United States v..... | 44 | Sussfeld, Lorsch & Co. v. United States..... | 332 |
| Quong Chun & Co., United States v..... | 198 | Thomsen & Co. v. United States..... | 69 |
| Redden & Martin v. United States..... | 485 | Thompson v. United States..... | 341 |
| Reed & Keller v. United States..... | 95 | Troy Laundry Machinery Co., United States v..... | 430 |
| Rice, United States v..... | 288 | Tuska, Son & Co. v. United States..... | 506 |
| Richard & Co., United States v..... | 444 | Uhlfelder Co. et al. v. United States..... | 33 |
| Roger & Gallet v. United States..... | 443 | Ulmann & Co. v. United States..... | 357 |
| Rosenhelm et al. v. United States..... | 100 | Van Ingen & Co., United States v..... | 432 |
| S. Bau Co. v. United States..... | 380 | Veith, United States v..... | 304 |
| Sakai et al. v. United States..... | 159 | Vitelli & Son, United States v..... | 151 |
| Saunders et al., United States v..... | 102 | Waddell & Co. v. United States..... | 63 |
| Saunders et al., United States v..... | 270 | Waddell & Co. v. United States..... | 183 |
| Scanlan, United States v..... | 290 | Walker, United States v..... | 215 |
| Schade & Co. v. United States..... | 465 | Welte & Sons v. United States..... | 164 |
| Schmidt v. United States..... | 312 | Wolff & Co., United States v..... | 418 |
| Schrock & Squires, United States v..... | 444 | Wright & Graham Co. v. United States..... | 453 |
| Scientific Supply Importing Co. v. United States..... | 56 | Wyman & Co., United States v..... | 483 |
| Semon Bachs & Co. v. United States..... | 496 | Younglove Grocery Co., United States v..... | 377 |
| Shallus v. United States..... | 73 | Zimmermann & Meyers et al. v. United States..... | 104 |
| Shallus v. United States..... | 317 | | |

TABLE OF CASES CITED IN OPINIONS.

| | Page. | | Page. |
|--|--------------------|--|---------------|
| Ahlbrecht & Son v. United States; 2 Ct. Cust. Appls., 471..... | 41, 257 | Bradley Martin, jr., v. United States; 1 Ct. Cust. Appls., 134..... | 313, 345 |
| Altman v. United States; 5 Ct. Cust. Appls., 170..... | 243 | Bromley v. United States; 156 Fed., 958..... | 411 |
| American Bead Co., United States v.; 3 Ct. Cust. Appls., 509..... | 183, 340, 420, 471 | Brown, United States v.; 2 Ct. Cust. Appls., 189..... | 174 |
| American Express Co., United States v.; 2 Ct. Cust. Appls., 95..... | 392, 558 | Browne v. United States; 145 Fed., 1..... | 130 |
| American Express Co. v. United States; 3 Ct. Cust. Appls., 475..... | 183, 420 | Brune v. Marriott; 4 Fed. Cas., 475..... | 266 |
| American Express Co. v. United States; 4 Ct. Cust. Appls., 146..... | 367 | Burlington Co., United States v.; 3 Ct. Cust. Appls., 378..... | 66 |
| American Express Co. v. United States; 4 Ct. Cust. Appls., 279..... | 166 | Burne, United States v.; 4 Ct. Cust. Appls., 298..... | 187 |
| Arnson v. Murphy; 115 U. S., 579..... | 156 | Buss & Warner, United States v.; 3 Ct. Cust. Appls., 87..... | 107 |
| Arthur's Executors v. Butterfield; 125 U. S., 70..... | 187 | Butler, United States v.; 3 Ct. Cust. Appls., 390..... | 329 |
| Arthur v. Goddard; 96 U. S., 145..... | 206, 207 | Cadwalader v. Zeh; 151 U. S., 171..... | 179 |
| Arthur v. Morgan; 112 U. S., 495..... | 142 | Cadwalader v. Wanamaker; 149 U. S., 532..... | 490 |
| Athenia Steel & Wire Co. v. United States; 1 Ct. Cust. Appls., 494..... | 339, 481 | Calhoun, United States v.; 154 Fed., 501..... | 154 |
| Austin, in re; 47 Fed., 873..... | 431 | Carson v. United States; 2 Ct. Cust. Appls., 105..... | 414, 425 |
| Bache v. United States; 4 Ct. Cust. Appls., 414..... | 346 | Carter v. United States; 1 Ct. Cust. Appls., 64..... | 142, 429 |
| Badische & Co., United States v.; 3 Ct. Cust. Appls., 528..... | 443 | Central Bridge Corporation v. Butler; 68 Mass., 130..... | 83 |
| Baker, United States v.; 2 Ct. Cust. Appls., 338..... | 169 | Chattanooga Brewing Co., United States v.; 3 Ct. Cust. Appls., 375..... | 432 |
| Ballard v. Thomas; 19 How., 382..... | 53, 207 | Cliff Paper Co. v. United States; 4 Ct. Cust. Appls., 186..... | 240, 367, 521 |
| Barney v. Oelrichs; 138 U. S., 529..... | 344 | Cochran, United States v.; 3 Ct. Cust. Appls., 57..... | 107, 230 |
| Bartley Bros. & Hall v. United States; 3 Ct. Cust. Appls., 363..... | 101 | Cohn, United States v.; 3 Ct. Cust. Appls., 273..... | 58 |
| Baruch, United States v.; 223 U. S., 191..... | 361 | Cohn v. United States; 4 Ct. Cust. Appls., 378..... | 471 |
| Bauer, United States v.; 3 Ct. Cust. Appls., 343..... | 26, 123 | Continental Color & Chemical Co., United States v.; 2 Ct. Cust. Appls., 165..... | 349, 494 |
| Bayersdorfer v. United States; 171 Fed., 286..... | 87 | Crämer v. Arthur; 102 U. S., 612..... | 150 |
| Bayersdorfer, United States v.; 175 Fed., 959..... | 87 | Cummins v. Robertson; 27 Fed., 654..... | 431 |
| Bayersdorfer & Co., United States v.; 126 Fed., 732..... | 432 | Curley, United States v.; 66 Fed., 720..... | 432 |
| Beach v. Sharpe; 154 Fed., 543..... | 275 | Dale v. United States; 2 Ct. Cust. Appls., 384..... | 42 |
| Bearce v. Dudley; 88 Me., 410..... | 81 | Danker, United States v.; 2 Ct. Cust. Appls., 522..... | 349, 494 |
| Beard v. Porter; 124 U. S., 437..... | 10, 25 | Danker & Marston, United States v.; 2 Ct. Cust. Appls., 462..... | 432 |
| Benjamin Iron & Steel Co. v. United States; 2 Ct. Cust. Appls., 159..... | 395, 432 | Davies v. Arthur; 96 U. S., 148..... | 429, 432 |
| Bennett, United States v.; 2 Ct. Cust. Appls., 249..... | 438 | Dejonge v. United States; 3 Ct. Cust. Appls., 463..... | 213 |
| Bennet, United States v.; 66 Fed., 299..... | 182 | Devereux, United States v.; 135 Fed., 428..... | 473 |
| Birtwell v. Saltonstall; 39 Fed., 384..... | 477 | Dingelstedt v. United States; 91 Fed., 112..... | 58, 65, 98 |
| Bliven v. United States; 1 Ct. Cust. Appls., 205..... | 142, 429, 431 | Dodge v. United States; 84 Fed., 449..... | 96 |
| Bloomington Bros. v. United States; 3 Ct. Cust. Appls., 204..... | 509 | Donat v. United States; 134 Fed., 1023..... | 106 |
| Blumenthal v. United States; 144 Fed., 384..... | 305, 329 | Donworth v. Sawyer; 94 Me., 242..... | 81 |
| Bogel v. United States; 1 Ct. Cust. Appls., 144..... | 372 | Downing, United States v.; 201 U. S., 354..... | 58 |
| Bowling Green Storage Co. v. United States; 3 Ct. Cust. Appls., 309..... | 143, 432 | Downing v. United States; 3 Ct. Cust. Appls., 473..... | 195 |
| | | Downing, United States v.; 146 Fed., 56..... | 368 |
| | | Eckstein, United States v.; 222 U. S., 130..... | 230 |
| | | Ellis v. Whitlock; 10 Mo., 781..... | 269 |

| | Page. | | Page. |
|--|-------------|--|-------------|
| Embossing Co., United States v.; 3 Ct. Cust. Appls., 220..... | 101 | Hawley & Letzerich v. United States; 3 Ct. Cust. Appls., 456..... | 154 |
| Erianger v. United States; 154 Fed., 949..... | 17,449 | Helmuth, United States v.; 145 Fed., 36..... | 119 |
| Eythage Co., United States v.; 4 Ct. Cust. Appls., 266..... | 123,439 | Hempstead & Son, United States v.; 3 Ct. Cust. Appls., 436..... | 116 |
| Fassett, in re; 142 U. S., 479..... | 354,377 | Hempstead v. United States; 168 Fed., 450..... | 329 |
| Fenster, United States v.; 2 Ct. Cust. Appls., 368..... | 395 | Hensel v. United States; 3 Ct. Cust. Appls., 117..... | 58 |
| Fensterer & Ruhe v. United States; 1 Ct. Cust. Appls., 93..... | 424 | Hensel, United States v.; 98 Fed., 418..... | 224 |
| Fenton v. United States; 1 Ct. Cust. Appls., 529..... | 489,495 | Hensel v. United States; 99 Fed., 722..... | 225 |
| Field v. United States; 73 Fed., 808..... | 248 | Hensel, Bruckmann & Lorbacher v. United States; 4 Ct. Cust. Appls., 496..... | 553 |
| Fischer v. United States; 5 Ct. Cust. Appls., 301..... | 422 | Herrman v. Arthur's Executors; 127 U. S., 363..... | 425 |
| Flatt, United States v.; 5 Ct. Cust. Appls., 210..... | 493 | Herrman v. Robertson; 152 U. S., 521..... | 432 |
| Fleet v. United States; 148 Fed., 335..... | 182 | Herrman, United States v.; 91 Fed., 116..... | 482 |
| Flietmann, United States v.; 137 Fed., 476..... | 432 | Hoeninghaus v. United States; 172 U. S., 622..... | 46 |
| Flory, United States v.; 4 Ct. Cust. Appls., 87..... | 296,440 | Holbrook v. United States; 1 Ct. Cust. Appls., 263..... | 425 |
| Franklyn, United States v.; 4 Ct. Cust. Appls., 54..... | 13,27 | Holland-American Trading Co., United States v.; 4 Ct. Cust. Appls., 336..... | 101 |
| Frank v. United States; 2 Ct. Cust. Appls., 85..... | 76,148,395 | Hollander v. United States; 4 Ct. Cust. Appls., 406..... | 286 |
| Furuya & Co. v. United States; 2 Ct. Cust. Appls., 371..... | 381 | Homer v. Collector; 1 Wall., 486..... | 136 |
| Gage Bros. & Co. v. United States; 2 Ct. Cust. Appls., 427..... | 395 | Horace Day Co. v. United States; 3 Ct. Cust. Appls., 152..... | 318 |
| Gardner & Co. v. United States; 2 Ct. Cust. Appls., 477..... | 280 | Houlder v. United States; 4 Ct. Cust. Appls., 247..... | 74 |
| George Knowles & Son, United States v.; 126 Fed., 737..... | 432 | Illfelder v. United States; 1 Ct. Cust. Appls., 109..... | 203,209,295 |
| Germain, United States v.; 3 Ct. Cust. Appls., 321..... | 415 | Jackson v. United States; 2 Ct. Cust. Appls., 475..... | 363 |
| German Gymnastic Assoc. v. Louisville; 80 So. West., 201..... | 255 | Jocelyn v. Barrett; 18 Ind., 128..... | 269 |
| Gillespie v. United States; 124 Fed., 106..... | 55 | Junge v. Hedden; 146 U. S., 233..... | 248 |
| Gips, United States v.; 4 Ct. Cust. Appls., 458..... | 443 | Kaskel & Kaskel v. United States; 4 Ct. Cust. Appls., 38..... | 553 |
| Goat & Sheepskin Import Co. v. United States; 5 Ct. Cust. Appls., 178..... | 420 | Kendall v. Lyman; 161 Fed., 652..... | 149 |
| Goldberg, United States v.; 3 Ct. Cust. Appls., 282..... | 372,471 | Kanyon v. United States; 4 Ct. Cust. Appls., 344..... | 216,329 |
| Gray v. Brignardello; 1 Wall., 627..... | 147 | Kimball v. Collector; 10 Wall., 436..... | 53 |
| Greenleaf v. Goodrich; 101 U. S., 278..... | 425 | King et al. v. Smith; 14 Fed. Cas., 551..... | 405 |
| Gulbenkian v. Stranahan; 158 Fed., 836..... | 149 | Klingenberg, United States v.; 153 U. S., 93..... | 19,150 |
| Guthman, Solomons & Co. v. United States; 3 Ct. Cust. Appls., 288..... | 179 | Klumpp v. Thomas; 162 Fed., 853..... | 150 |
| Haaker, United States v.; 4 Ct. Cust. Appls., 471..... | 41,258 | Klumpp, United States v.; 169 U. S., 209..... | 421 |
| Hadden v. Merritt; 115 U. S., 25..... | 150 | Kraemer & Co., United States v.; 4 Ct. Cust. Appls., 433..... | 101 |
| Hahn, United States v.; 91 Fed., 755..... | 425 | Kraemer & Co. v. United States; 5 Ct. Cust. Appls., 66..... | 527 |
| Hahn v. United States; 100 Fed., 635..... | 88 | Knauth v. United States; 1 Ct. Cust. Appls., 334..... | 42 |
| Hall Coal Co., United States v.; 134 Fed., 1003..... | 377 | Knoedler v. United States; 113 Fed., 999..... | 379 |
| Hampton, Jr., & Co., v. United States; 5 Ct. Cust. Appls., 51..... | 71,127 | Kurtz, Stuboeck & Co., United States v.; 5 Ct. Cust. Appls., 144..... | 272 |
| Hansen v. United States; 1 Ct. Cust. Appls., 1..... | 392 | Kuyper v. United States; 5 Ct. Cust. Appls., 175..... | 476 |
| Harper, United States v.; 2 Ct. Cust. Appls., 101..... | 183,420 | La Fetra, United States v.; 172 Fed., 297..... | 479,480 |
| Harris v. United States; 3 Ct. Cust. Appls., 5..... | 318 | La Fetra, United States v.; 178 Fed., 1006..... | 480 |
| Hartranft v. Langfeld; 125 U. S., 128..... | 116,490 | Lake Ontario Fish Co. v. United States; 99 Fed., 551..... | 132 |
| Hartranft v. Meyer; 135 U. S., 237..... | 262 | Latimer v. United States; 223 U. S., 501..... | 187 |
| Hartranft v. Meyer; 149 U. S., 544..... | 490 | Lauricella v. United States; 4 Ct. Cust. Appls., 253..... | 74 |
| Hartranft v. Sheppard; 125 U. S., 337..... | 446 | Lazarus v. United States; 2 Ct. Cust. Appls., 506..... | 196 |
| Hatters' Fur Exchange, United States v.; 1 Ct. Cust. Appls., 198..... | 183,408,420 | Leber & Meyer v. United States; 135 Fed., 243..... | 349 |
| Hawaii & South Seas Co., United States v.; T. D. 26778..... | 471 | Leggett, United States v.; 66 Fed., 300..... | 224 |
| | | Lehigh Mfg. Co. v. United States; 153 Fed., 596..... | 411 |

TABLE OF CASES CITED.

IX

| | Page. |
|---|--------------------|
| Leigh & Butler, United States v.; 4 Ct. Cust. Appls., 304..... | 363, 412 |
| Levi v. United States; 87 Fed., 193..... | 263 |
| Lewisohn v. United States; 5 Ct. Cust. Appls., 204..... | 318 |
| Lueder, United States v.; 154 Fed., 1..... | 380 |
| Lichtenstein v. United States; 1 Ct. Cust. Appls., 79..... | 142 |
| Littlejohn v. United States; 119 Fed., 483.... | 349 |
| Loeb v. United States; 1 Ct. Cust. Appls., 385.... | 292 |
| Loggie v. United States; 137 Fed., 813..... | 559 |
| Lord & Taylor, United States v.; 4 Ct. Cust. Appls., 322..... | 313 |
| Lorsch & Co. v. United States; 5 Ct. Cust. Appls., 93..... | 339 |
| Louisville Pillow Co. v. United States; 144 Fed., 396..... | 154 |
| Lun Chong, United States v.; 3 Ct. Cust. Appls., 468..... | 199, 408 |
| Lyon & Healy, United States v.; 4 Ct. Cust. Appls., 438..... | 303, 481, 485, 488 |
| McAllister v. United States; 147 Fed., 773..... | 96 |
| McBratney, United States v.; 105 Fed., 767.... | 248 |
| Macmillan Co. v. United States; 116 Fed., 1018 | 526 |
| Maddaus v. United States; 3 Ct. Cust. Appls., 330..... | 292 |
| Magone v. Heller; 150 U. S., 70..... | 339 |
| Magone v. Wieders; 150 U. S., 555..... | 490 |
| Malouf v. United States; 1 Ct. Cust. Appls., 437..... | 473 |
| Marriott v. Brune; 9 How., 619..... | 130, 266 |
| Mark Cross Co. v. United States; 1 Ct. Cust. Appls., 377..... | 42 |
| Mark Cross Co., United States v.; 4 Ct. Cust. Appls., 274..... | 250 |
| Marine v. Lyon; 65 Fed., 992..... | 146 |
| Marshall Field & Co., United States v.; 85 Fed., 862..... | 305 |
| Mason v. Robertson; 139 U. S., 624..... | 42 |
| Masson, United States v.; 4 Ct. Cust. Appls., 363..... | 308 |
| Matagrín, United States v.; 1 Ct. Cust. Appls., 309..... | 183, 420 |
| Matheson v. United States; 99 Fed., 261..... | 443 |
| Matter of Mergentime; 129 N. Y. App. Div., 367..... | 255 |
| Matter of Moses; 138 N. Y., App. Div., 525.... | 255 |
| Mavtner v. United States; 84 Fed., 155..... | 182 |
| Maxwell v. Griswold; 10 How., 241..... | 139, 449 |
| Menzel v. United States; 135 Fed., 918..... | 392 |
| Merk, United States v.; 66 Fed., 251..... | 349 |
| Merek v. United States; 151 Fed., 14..... | 250 |
| Mexican International R. R. Co., United States v.; 151 Fed., 545..... | 154 |
| Meyer v. United States; 3 Ct. Cust. Appls., 247..... | 372 |
| Michels Tire Co., United States v.; 1 Ct. Cust. Appls., 518..... | 408 |
| Moore v. United States; 1 Ct. Cust. Appls., 115.... | 481 |
| Moos & Co., United States v.; 5 Ct. Cust. Appls., 322..... | 378 |
| Morrill v. Jones; 106 U. S., 466..... | 379 |
| Morris European & American Express Co., United States v.; 1 Ct. Cust. Appls., 300.... | 548 |
| Morris European & American Express Co., United States v.; 3 Ct. Cust. Appls., 146.... | 134 |

| | Page. |
|---|-------------------|
| Morrison, United States v.; 179 U. S., 456..... | 93 |
| Mount Hermon Boys' School v. Gill; 145 Mass., 130..... | 255 |
| Murphy v. Arnsen; 96 U. S., 131..... | 234 |
| Myers & Co., United States v.; 4 Ct. Cust. Appls., 431..... | 117 |
| Myers & Co., In re; 123 Fed., 953..... | 96 |
| Nash, United States v.; 27 Fed. Cas., 750..... | 128 |
| National Aniline & Chemical Co. United States v.; 3 Ct. Cust. Appls., 10..... | 425 |
| National Steam Navigation Co., United States v.; 4 Ct. Cust. Appls., 491..... | 127 |
| Newhall v. United States; 4 Ct. Cust. Appls., 134..... | 183, 420 |
| Newman-Andrews Co. v. United States; 2 Ct. Cust. Appls., 4..... | 307 |
| Nix v. Hedden; 149 U. S., 304..... | 33 |
| Nozaki Bros., United States v.; 5 Ct. Cust. Appls., 286..... | 289 |
| Oberle, United States v.; 1 Ct. Cust. Appls., 527..... | 372, 403 |
| Oberteuffer v. Robertson; 116 U. S., 499..... | 4, 7, 17, 25, 354 |
| Oelrichs v. United States; 2 Ct. Cust. Appls., 355..... | 292, 318 |
| Oelrichs v. United States; 3 Ct. Cust. Appls., 232..... | 143, 431 |
| Oppenheimer v. United States; 66 Fed., 52, 112, 487 | |
| Palma, United States v.; 4 Ct. Cust. Appls., 140..... | 325, 378 |
| Park & Tilford, United States v.; 3 Ct. Cust. Appls., 350..... | 395, 432 |
| Park & Tilford, United States v.; 4 Ct. Cust. Appls., 293..... | 272 |
| Passavant, United States v.; 169 U. S., 16.... | 22 |
| Paterson v. United States; 166 Fed., 733..... | 107 |
| Patton v. United States; 159 U. S., 500..... | 187 |
| Peacock & Co. v. United States; 2 Ct. Cust. Appls., 305..... | 381 |
| Peabody, United States v.; 3 Ct. Cust. Appls., 130..... | 225 |
| Perkins, United States v.; 1 Ct. Cust. Appls., 323..... | 414 |
| Perry, United States v.; 171 Fed., 303..... | 333 |
| Petry v. United States; 3 Ct. Cust. Appls., 348..... | 201 |
| Phelps, United States v.; 17 Blatch., 321..... | 153 |
| Pierce, United States v.; 147 Fed., 199..... | 117 |
| Plummer v. United States; 3 Ct. Cust. Appls., 229..... | 230 |
| Post, United States v.; 3 Ct. Cust. Appls., 260.... | 182 |
| Powers v. Russell; 13 Pick. (Mass.), 69..... | 84 |
| Presson v. Russell; 152 U. S., 577..... | 432 |
| Prosser v. United States; 1 Ct. Cust. Appls., 29..... | 411 |
| Prosser v. United States; 158 Fed., 971..... | 271 |
| Proctor, United States v.; 5 Ct. Cust. Appls., 44..... | 71, 100, 127 |
| Psaki Bros. v. United States; 3 Ct. Cust. Appls., 479..... | 182 |
| Railroad Co. v. Swan; 111 U. S., 379..... | 374 |
| Ranlett, United States v.; 172 U. S., 133.... | 226, 404 |
| Reading, United States v.; 1 Ct. Cust. Appls., 515..... | 132 |
| Reed & Keller v. United States; 172 Fed., 453.... | 98 |
| Reibe, United States v.; 1 Ct. Cust. Appls., 19.... | 425 |

| | Page. | | Page. |
|--|---------------|--|-------------------|
| <i>Reiche v. Smythe</i> ; 13 Wall., 162..... | 136 | <i>Stein v. United States</i> ; 1 Ct. Cust. Appls., 36, 478..... | 26, 140, 354, 449 |
| <i>Rhelms, United States v.</i> ; 175 Fed., 778..... | 107 | <i>Stein v. United States</i> ; 2 Ct. Cust. Appls., 519..... | 172, 247 |
| <i>Rich v. United States</i> ; 172 Fed., 233..... | 234 | <i>Stern v. United States</i> ; 105 Fed., 937..... | 59 |
| <i>Richard v. United States</i> ; 3 Ct. Cust. Appls., 306..... | 303 | <i>Stern Bros. v. United States</i> ; 2 Ct. Cust. Appls., 436..... | 313 |
| <i>Richard v. United States</i> ; 4 Ct. Cust. Appls., 470..... | 303 | <i>Stirn, United States v.</i> ; 3 Ct. Cust. Appls., 62..... | 48 |
| <i>Richards, United States v.</i> ; 1 Ct. Cust. Appls., 537..... | 119 | <i>Stone v. Heineman</i> ; 100 Fed., 940..... | 263 |
| <i>Richter, United States v.</i> ; 2 Ct. Cust. Appls., 167..... | 477 | <i>Stone & Downer Co. v. United States</i> ; 4 Ct. Cust. Appls., 47..... | 29, 446 |
| <i>Ringk, United States v.</i> ; 4 Ct. Cust. Appls., 349..... | 2, 49 | <i>Stone v. Whitridge</i> ; 129 Fed., 33..... | 146 |
| <i>Robertson v. Bradbury</i> ; 132 U. S., 491..... | 55, 289 | <i>Stores, United States v.</i> ; 14 Fed., 824..... | 80 |
| <i>Robertson v. Edelhoff</i> ; 132 U. S., 614..... | 490 | <i>Strakosh v. United States</i> ; 1 Ct. Cust. Appls., 360..... | 432, 447 |
| <i>Robertson v. Frank</i> ; 132 U. S., 17..... | 354, 449 | <i>Strauss, United States v.</i> ; 5 Ct. Cust. Appls., 147..... | 438 |
| <i>Robertson v. Frank Bros. Co.</i> ; 132 U. S., 17..... | 140 | <i>Strauss & Co. v. United States</i> ; 2 Ct. Cust. Appls., 203..... | 424 |
| <i>Robertson v. Gerdan</i> ; 132 U. S., 454..... | 69 | <i>Strauss & Co., United States v.</i> ; 3 Ct. Cust. Appls., 180, 325..... | 404 |
| <i>Robertson v. Rosenthal</i> ; 132 U. S., 460..... | 136 | <i>Strauss & Co., United States v.</i> ; 4 Ct. Cust. Appls., 386..... | 297 |
| <i>Robinson v. United States</i> ; 122 Fed., 970..... | 112 | <i>Stursberg, Schell & Co. v. United States</i> ; 3 Ct. Cust. Appls., 370..... | 248 |
| <i>Robinson, United States v.</i> ; 124 Fed., 1013..... | 479, 480 | <i>Swan v. Arthur</i> ; 103 U. S., 597..... | 187 |
| <i>Roessler & Hasslacher Chemical Co. v. United States</i> ; 64 Fed., 822..... | 349 | <i>Swedish Produce Co., United States v.</i> ; 4 Ct. Cust. Appls., 223..... | 46, 71, 100, 127 |
| <i>Rosenstein, United States v.</i> ; 1 Ct. Cust. Appls., 304..... | 41, 258 | <i>Sykes v. Magone</i> ; 38 Fed., 494..... | 234 |
| <i>Ross & Peaslee</i> ; 20 Fed. Cas., 1241..... | 88 | <i>Tatum, United States v.</i> ; 2 Ct. Cust. Appls., 425..... | 190 |
| <i>Ruchs v. Backer</i> ; 6 Helsk., 395..... | 255 | <i>The Conqueror</i> ; 166 U. S., 133..... | 194 |
| <i>Salambier, United States v.</i> ; 170 U. S., 621..... | 429 | <i>Thomass v. United States</i> ; 1 Ct. Cust. Appls., 86..... | 230 |
| <i>Saxonville Mills v. Russell</i> ; 116 U. S., 13..... | 53 | <i>Thomsen & Co. v. United States</i> ; 5 Ct. Cust. Appls., 69..... | 127 |
| <i>Salomon, United States v.</i> ; 1 Ct. Cust. Appls., 246..... | 466 | <i>Tilge v. United States</i> ; 1 Ct. Cust. Appls., 462..... | 292 |
| <i>Salomon v. United States</i> ; 2 Ct. Cust. Appls., 92..... | 101, 248 | <i>Tilge v. United States</i> ; 2 Ct. Cust. Appls., 149..... | 292, 354 |
| <i>Salomon Bros. & Co. v. United States</i> ; 2 Ct. Cust. Appls., 431..... | 187, 408, 496 | <i>Tracy v. Swartwout</i> ; 10 Pet., 80..... | 379 |
| <i>Schoverling, United States v.</i> ; 146 U. S., 76..... | 69 | <i>Trefousse v. United States</i> ; 144 Fed., 708, 154 Fed., 1005..... | 479, 480 |
| <i>Schleffelin v. United States</i> ; 84 Fed., 880..... | 443 | <i>Ullman v. Murphy</i> ; 24 Fed. Cas., 506..... | 267 |
| <i>Schiff v. United States</i> ; 2 Ct. Cust. Appls., 89..... | 488 | <i>Ullman v. United States</i> ; 1 Ct. Cust. Appls., 61..... | 379 |
| <i>Schoellkopf v. United States</i> ; 71 Fed., 694..... | 466 | <i>Ullmann & Co. v. United States</i> ; 4 Ct. Cust. Appls., 77..... | 357 |
| <i>Schoenemann v. United States</i> ; 119 Fed., 584..... | 496 | <i>Ullmann & Co., United States v.</i> ; 139 Fed., 3..... | 276 |
| <i>Schulemann v. United States</i> ; 123 Fed., 1002..... | 248 | <i>United Cigar Stores Co. v. United States</i> ; 4 Ct. Cust. Appls., 66..... | 78 |
| <i>Scott v. Wood</i> ; 81 Cal., 398..... | 83 | <i>Universal Shipping Co. v. United States</i> ; 4 Ct. Cust. Appls., 245..... | 516 |
| <i>Seeburger v. Castro</i> ; 153 U. S., 32..... | 408 | <i>Vandegrift v. United States</i> ; 3 Ct. Cust. Appls., 176..... | 380 |
| <i>Seeburger v. Schlesinger</i> ; 152 U. S., 581..... | 482 | <i>Vandegrift v. United States</i> ; 3 Ct. Cust. Appls., 219..... | 312 |
| <i>Shallus v. United States</i> ; 1 Ct. Cust. Appls., 316..... | 169 | <i>Vandegrift, United States v.</i> ; 4 Ct. Cust. Appls., 226..... | 216 |
| <i>Shaw v. United States</i> ; 122 Fed., 443..... | 144 | <i>Vandegrift & Co., United States v.</i> ; 3 Ct. Cust. Appls., 161..... | 179 |
| <i>Sheldon, United States v.</i> ; 2 Ct. Cust. Appls., 485..... | 349 | <i>Vandiver v. United States</i> ; 1 Ct. Cust. Appls., 194..... | 116 |
| <i>Simon & Co., United States v.</i> ; 169 Fed., 106..... | 276 | <i>Vandiver v. United States</i> ; 2 Ct. Cust. Appls., 505..... | 88 |
| <i>Smith v. Schell</i> ; 27 Fed., 648..... | 431 | <i>Van Ingen & Co. v. United States</i> ; 4 Ct. Cust. Appls., 320..... | 449 |
| <i>Smith & Nessler Co., United States v.</i> ; 4 Ct. Cust. Appls., 70..... | 41, 258 | <i>Vantine v. United States</i> ; 91 Fed., 519..... | 53 |
| <i>Solvay, In re</i> ; 134 Fed., 678..... | 432 | | |
| <i>Sonn v. Magone</i> ; 159 U. S., 417..... | 490 | | |
| <i>Sonneborn's Sons v. United States</i> ; 3 Ct. Cust. Appls., 64..... | 429 | | |
| <i>Spielman, United States v.</i> ; 1 Ct. Cust. Appls., 279..... | 414 | | |
| <i>Spielmann & Co. v. United States</i> ; 3 Ct. Cust. Appls., 368..... | 441 | | |
| <i>Spingarn Bros., United States v.</i> ; 5 Ct. Cust. Appls., 2..... | 207, 434 | | |
| <i>Sprague, Warner et al., United States v.</i> ; 4 Ct. Cust. Appls., 358..... | 325, 378 | | |
| <i>Squires v. Peaslee</i> ; 59 U. S., 521..... | 289, 318 | | |
| <i>State v. Kansas City R. R. Co.</i> ; 32 Fed., 722..... | 269 | | |

TABLE OF CASES CITED.

XI

| | Page. | | Page. |
|--|--------------------|--|----------------------|
| Vitelli v. United States; 3 Ct. Cust. Appls., 171..... | 169 | Wertheimer & Co., United States v.; 2 Ct. Cust. Appls., 454..... | 414 |
| Voorhees v. United States Bank; 10 Pet., 449. | 147 | Westrumite Co., United States v.; 1 Ct. Cust. Appls., 400..... | 477 |
| Waddell v. United States; 3 Ct. Cust. Appls., 406..... | 188 | White, United States v.; 2 Ct. Cust. Appls., 80..... | 213 |
| Wakam, United States v.; 2 Ct. Cust. Appls., 411..... | 59 | Whitridge, United States v.; 197 U. S., 135... | 150 |
| Walker v. Seeberger; 149 U. S., 541..... | 490 | Wing Wo Chong, United States v.; 98 Fed., 602..... | 90 |
| Wallace, United States v.; 4 Ct. Cust. Appls., 142..... | 98 | Windsor v. McVeigh; 93 U. S., 274..... | 273 |
| Walter, United States v.; 4 Ct. Cust. Appls., 95..... | 66 | Wolff v. United States; 1 Ct. Cust. Appls., 181..... | 206, 318 |
| Waterhouse, United States v.; 1 Ct. Cust. Appls., 353..... | 226, 404 | Woodruff v. United States; 168 Fed., 452.... | 329 |
| Waterman v. Bailev; 111 Mich., 571..... | 512 | Woolworth v. United States; 1 Ct. Cust. Appls., 120..... | 183, 420 |
| Wells, Fargo & Co., United States v.; 1 Ct. Cust. Appls., 158..... | 466 | Worthington v. Robbins; 139 U. S., 337..... | 481 |
| Weilbacher v. Merritt; 37 Fed., 85..... | 234 | Wyman, United States v.; 4 Ct. Cust. Appls., 264..... | 46, 53, 71, 100, 127 |
| Wertheimer, United States v.; 4 Ct. Cust. Appls., 338..... | 414, 415, 478, 479 | Zinn, United States v.; 2 Ct. Cust. Appls., 419. | 329 |
| Wertheimer v. United States; 77 Fed., 600... | 479 | Zucker v. Magone; 37 Fed., 776..... | 263 |
| | | Zuricaldy, United States v.; 71 Fed., 955..... | 55 |

CASES ADJUDGED IN THE UNITED STATES COURT OF CUSTOMS APPEALS.

UNITED STATES *v.* HOGAN (No. 1013).¹

WOODEN SPOOLS WITH SILK YARN THEREON.

So far as the record here discloses, the facts in this case were taken below to be the same with the facts in *United States v. Ringk* (4 Ct. Cust. Appls., 349; T. D. 33530). The collector's classification must stand on the record here.

United States Court of Customs Appeals, December 15, 1913.

APPEAL from Board of United States General Appraisers, Abstract 29589 (T. D. 32780).

[Reversed.]

William L. Wemple, Assistant Attorney General (*Frank L. Lawrence*, special attorney, on the brief), for the United States.

Submitted on record by appellee.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MARTIN, Judge, delivered the opinion of the court:

The merchandise involved in this case was returned by the appraiser as manufactures of wood, dutiable under paragraph 215 of the tariff act of 1909, and the collector assessed duty thereon in accordance with this return.

The importer filed his protest against the assessment, claiming that the merchandise covered by the entry consists of artificial silk yarn wound upon forms or spools; that the silk yarn is subject to a specific rate of duty; that the spools are articles or forms necessary for the proper preparation of the yarn for transportation and are not intended for use otherwise than for the bona fide transportation of the merchandise; and that they are entitled to entry free of duty as usual articles or forms for holding merchandise subject to a specific duty.

The protest was submitted to the Board of General Appraisers without testimony. The board sustained the protest, stating in its decision that the merchandise involved in the case is identical with that in *Ringk's* case, which had already been decided by the board in Abstract 29613 (T. D. 32780). From this decision of the board the Government now appeals.

¹ Reported in T. D. 34001 (25 Treas. Dec., 657).

There is no testimony in the record, nor are there any samples before the court. The case, therefore, depends upon the appraiser's return, the collector's assessment, the importer's protest, and the board's decision. In that decision the board rests its conclusion upon its former decision in the Ringk case, upon merchandise which the board states is identical with that at bar. The Ringk case, however, was later appealed to this court; the board's decision therein was reversed; and the collector's assessment of the merchandise therein was sustained. See *United States v. Ringk* (4 Ct. Cust. Appls., 349; T. D. 33530). Therefore if the present merchandise is identical in character with that involved in the Ringk case, as is stated by the board, the present decision should be reversed. If on the other hand this merchandise differs from that involved in the Ringk case, that fact should be proven by testimony. Upon the present record the court is altogether without proof upon that point. The claims made by the importer in the protest do not themselves have the force or effect of evidence; in so far as they raise an issue of fact with the collector's classification they can not prevail without proof.

The decision of the board is therefore *reversed*.

UNITED STATES *v.* SPINGARN BROS. (No. 1072).¹

COLLECTOR'S AUTHORITY IN RELIQUIDATING.

The legislative and judicial history of the customs administrative act is reviewed. The customs administrative law markedly differentiates between actual market value and dutiable actual market value, and makes it the duty of the appraising officer to determine the first, the duty of the collector to determine the last. The goods here—feathers—were packed in inside boxes and there had been additional packing charges, though all mention of these was omitted from the consular invoice. The collector, on being later apprised of the fact of omission, reliquidated the entry by adding thereto the packing charges. There was in this no interference with or change of the invoice entered or appraised valuation; the collector simply exercised his right of adding to the appraised value to make dutiable value these packing charges. *Beard v. Porter* (124 U. S., 437).—*United States v. Francklyn* (4 Ct. Cust. Appls., 54; T. D. 33306) distinguished.

United States Court of Customs Appeals, December 15, 1913.

APPEAL from Board of United States General Appraisers, Abstract 30556 (T. D. 32943).
[Reversed.]

William L. Wemple, Assistant Attorney General, for the United States.
Jules Chopak, jr., for appellees.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

DE VRIES, Judge, delivered the opinion of the court:

The sole question presented by this record concerns the respective duties of the collector and appraiser in assessing for duty items for

¹ Reported in T. D. 34002 (25 Treas. Dec., 658).

cartons or packing charges upon an invoice. The particular invoice was of nine cases of feathers, packed in 515 inside boxes, invoiced as follows:

| | | |
|-----------------------------|----------|----------|
| S. B. 862-70..... | Francs.. | 5,267.15 |
| 9 cases and packing..... | | 268.85 |
| 515 inside boxes, 0.60..... | | 309.00 |
| Certificate..... | N. D.. | 13.00 |
| | Frcs.. | 5,858.00 |

The appraisement was as follows:

Appraiser's notation. S. B. 870 correct. Case as noted; balance classified. April 13, 1910. GWS. A. L. Kline, assistant appraiser. Approved. Geo. W. Wanmaker, appraiser.

Duty was taken accordingly by the collector. Subsequently there came to the attention of the collector a private "debit note" sent importers by the commissionaire, as follows:

| | |
|--|---------------|
| | Francs. |
| 7 per cent commission on frcs. 5,267.15..... | 368.70 |
| Add. charges on 515 inside boxes, 0.40..... | 206.00 |
| | Frcs.. 574.70 |

It appears from the record that the goods were purchased for the importers at a wholesale price by their commissionaire, to whom they were delivered and by whom the goods, which were feathers, were peculiarly packed in inside boxes, for which inside boxes, in part, this additional charge was made. It was therefore strictly a part of the cost or charge of packing the goods in a condition ready for export shipment.

The collector upon being advised of this private memorandum, which was more than a year after appraisement and liquidation, having discovered fraud, as it was claimed, reliquidated the entry by adding 206 francs as additional packing charges, which this debit note admitted were omitted from the consular invoice. The importer protested, and the board, upon the theory that this constituted a reappraisement of the merchandise by the collector, sustained the protest. The Government appeals. It is stipulated in the record that the time of the reliquidation, being more than one year after the original liquidation, shall not be here made an issue. The board said:

The invoice includes an item of 515 boxes at 60 centimes per box. The goods appear to have been appraised by the appraiser at the entered or invoiced value. Subsequent to the appraisal and after the original liquidation it appears that the collector added to the invoiced or appraised value of the goods the amount of 40 centimes per box for the 515 boxes. The value of the boxes is, of course, included in the appraised value of the goods.

It may be said in passing that the appraiser's notation does not necessarily indicate that the value of the boxes was included in his appraised value of the goods. Certainly not as a part of their *per se* value, for he simply approved the invoice valuation which separately stated these values not as a part of the *per se* value of the merchan-

dise, but expressly as packing charges or "inside boxes" independently stated on the invoice. If there was an appraisement of these charges by the appraiser, it was as noted on the invoice as "inside boxes" or cartons and not as a part of the *per se* value of the goods. If we subsequently find, therefore, that it is no part of the appraiser's legal duty and consequent power to appraise such charges, his usurpation of the collector's functions would not be of any legal force. As said by the Supreme Court in *Oberteuffer v. Robertson* (116 U. S., 499, 516) speaking of such action:

Although in form the appraiser added the items for cartons and packing, the action of the customhouse was only a decision of the collector, under section 2931, that the cartons and packing were dutiable costs and charges.

Of course, both the collector and the appraiser derive their respective powers and duties from the statute; and if the statute nowhere invests the appraiser with the power nor prescribes it his duty to appraise the packages, or costs, charges, and expenses of packing the goods in a condition ready for shipment, such are not legal items of his appraisement, and his inclusion of the same in such does not make them legally such or oust the collector of his duty or power under the statute to "ascertain, fix," and "decide" what are, and in a proper place add such to, the actual market value of the goods in his determination of the *dutiable* value of the importation which under the statute he alone determines.

If any doubt exists as to the construction to be given section 18, the clear and precise distinctions observed in all other paragraphs of the law *in pari materia* conclusively indicate that that section defines and relates to *dutiable* value alone, is the sole paragraph enumerating and declaring all the factors upon which "duty shall be assessed" and defining such, and when so read harmonizes all other provisions of the administrative law.

In almost every paragraph of the customs administrative law Congress has plainly evidenced the purpose to separate and hold distinct the actual market value *per se* and the incidental cases and packing charges of imported merchandise, so that the performance of the respective duties of the appraiser and collector might be possible and facilitated. And Congress has equally clearly empowered the appraiser with the duty and confined his authority by express statutory words solely to a determination of the actual market value of the goods *per se* as bought and sold in wholesale quantities in the country of exportation. Equally plainly has Congress empowered the collector alone with the power of determination of what are and what are not "costs and charges." *A fortiori*, what an anomalous condition would be presented if the appraiser may bind the collector in making costs or charges a part of market value, when the legal determination of what are or are not such in the particular case is not under the statute had until after appraisement.

Whether or not costs, charges, and expenses of putting the goods in condition packed ready for shipment are items entering into the actual market value and wholesale price of imported merchandise to be estimated as such by the appraiser or are separate items, which though the same may be determined by the appraiser in form are, nevertheless, items of dutiable value and to be so included or excluded by the decision of the collector as the case may require, may be determined by a reading together of all of the provisions of the customs administrative law relating thereto and giving that effect to the whole which will give some effect to each provision and harmonize all.

Section 2 in providing what the invoice shall contain states that it "shall contain a correct, complete, and detailed description of such merchandise, *and* of the packages, wrappings, or other coverings containing it."

Section 3 prescribes that the declaration upon the invoice shall set forth, of the invoice, certain matters and shall certify "if the merchandise was obtained by purchase, * * * the actual cost thereof, *and* of all charges thereon, * * * and when obtained in any other manner than by purchase, the actual market value or wholesale price thereof, * * * that such actual market value is the price at which the merchandise described in the invoice is freely offered for sale to all purchasers in said markets, and that it is the price which the manufacturer or owner making the declaration would have received, and was willing to receive, for such merchandise *sold in the ordinary course of trade* in the usual wholesale quantities, *and*" that the invoice "includes *all charges* thereon *as provided by this act*, and the actual quantity thereof."

This section affixes the status or condition of the goods, whereupon "actual market value" is to be ascertained as that when such are "sold in the ordinary course of trade in the usual wholesale quantities" in the country of exportation. This may or may not be in packages or packed. It may and ordinarily is in vastly different packages than when sold to be exported, distance, heavy wear and tear, possibilities of water damage, and many other elements rendering the export condition "packed ready for shipment" greatly different from that when "sold in the ordinary course of trade" in the country of exportation. So that the "actual market value" to be determined is not necessarily that including export packages, *does not include such* as defined in this section of the law, but refers to the merchandise in a probably different status or condition.

Section 5 regulates the several declarations required to be made upon entry:

(a) Under the declaration of consignee, importer, or agent, where merchandise has been actually purchased, it is required that it shall state—

That the *invoice* now produced by me exhibits the actual cost * * * of the said goods, wares, and merchandise, *and includes and specifies* the value of all cartons, cases,

crates, boxes, sacks, casks, barrels, hogsheads, bottles, jars, demijohns, carboys, and other containers or coverings, * * * which are not otherwise specially subject to duty under any paragraph of the tariff act, *and* all other costs, charges, and expenses incident to placing said goods, wares, and merchandise in condition, packed ready for shipment. * * *

(b) It requires that the declaration of consignees, importer, or agent, where merchandise has not been actually purchased, shall declare—

That the invoice now produced by me exhibits the *actual market value or wholesale price* at the time of exportation * * * of the said goods, wares, and merchandise, *and includes and specifies* the value of all cartons, cases, crates, boxes, sacks, casks, barrels, hogsheads, bottles, jars, demijohns, carboys, and other containers or coverings, * * * *and all other costs, charges, and expenses incident to placing said goods, wares, and merchandise in condition, packed ready for shipment.* * * *

(c) It requires that the declaration of owner in cases where merchandise has been actually purchased shall declare—

That the invoice and entry * * * contain a just and faithful account of the actual cost of the said goods, wares, and merchandise, *and include and specify* the value of all cartons, cases, crates, boxes, sacks, casks, barrels, hogsheads, bottles, jars, demijohns, carboys, and other containers or coverings, * * * *and all other costs, charges, and expenses incident to placing said goods, wares, and merchandise in condition, packed ready for shipment,* * * *.

(d) It further requires that the declaration of manufacturer or owner in cases where merchandise has not been actually purchased shall declare—

That nevertheless the invoice which I now produce contains a just and faithful valuation of the same, at their *actual market value* or wholesale price, * * * in the principal markets of the country from whence imported; * * * that such actual market value is the price at which the merchandise described in the invoice is freely offered for sale to all purchasers in said markets and is the price which I would have received and was willing to receive for such merchandise *sold in the ordinary course of trade and in the usual wholesale quantities*; that the said invoice contains *also* a just and faithful account of all the costs of finishing said goods, wares, and merchandise to their present condition, *and [said invoice] includes and specifies* the value of all cartons, cases, crates, boxes, sacks, casks, barrels, hogsheads, bottles, jars, demijohns, carboys, and other containers or coverings, * * * which are not otherwise specially subject to duty under any paragraph of the tariff act, *and [said invoice indicates and specifies] all other costs and charges incident to placing said goods, wares, and merchandise in condition, packed ready for shipment,* * * *.

Obviously Congress considered that neither packages nor costs and charges were included in actual market value, else why specify them separately?

If there is any ambiguity in any other section of the law as to what constitutes actual market value, and that it is regarded as separate from packages and costs and charges, this section is clear and unambiguous. It declares what and what alone shall make up actual market value as "the price at which the merchandise described in the invoice is freely offered for sale to all purchasers in said markets and is the price which I would have received and was willing to receive for such merchandise *sold in the ordinary course of*

trade in the usual wholesale quantities." This clear and succinct definition of "actual market value" as used by Congress contains no element of packages or charges. They might or might not in some form alike or different from export account be included, but are not affixed as a part of the definition by Congress. Nor did Congress not have such in mind, for it immediately continues in the paragraph differentiating such from market value by requiring their inclusion but separate specification on the invoice.

In *Oberteuffer v. Robertson* (116 U. S., 499, 512) *the forms of these oaths were set out at length and made the foundation in part of the court's opinion* that costs, charges, and expenses, were not to be deemed a part of the market value to be ascertained by the appraiser, but which—

Although, in form, the appraiser added the items for cartons and packing, the action of the customhouse was only a decision of the collector, under section 2931, that the cartons and packing were dutiable costs and charges.

Section 7 defines the cases in which the collector shall submit to the appraiser questions of appraisement and the limitations thereof. It states:

And the collector * * * shall cause the actual market value or wholesale price of such merchandise to be appraised; * * *.

Whenever Congress has spoken of packages and other costs and charges heretofore it does so expressly. Not including such here, this grant of jurisdiction and power to the appraiser does not under any rule of construction invest him with power to appraise that not submitted to him for appraisement, to wit, "packages" or other costs, charges, and expenses.

This definition of the duties and powers of the appraiser concerns the value of the merchandise in the country of exportation, but does not necessarily relate to the same as packed ready for shipment or include the costs, charges, or expenses in so packing the same for shipment. Such a condition of the merchandise may or may not be an element of the actual market value or wholesale price thereof in the country of exportation according to the customs of the particular trade or country. When such they are not appraised as such, but as a necessary element or part of the actual market value of the goods as sold in the ordinary course of trade in the country of exportation.

This section further provides penalties and exactions where the "appraised value" exceeds the entered value. These provisions have never been held to be related to the costs, charges, and expenses or coverings, for they are not *per se* deemed a part of the "actual market value."

Section 10 defines and prescribes the duty of the appraising officers and corresponds with the provisions of section 18 in that it requires

the appraiser or person acting as such "to ascertain, estimate, and appraise * * * the actual market value and wholesale price of the merchandise * * * and the number of yards, parcels, or quantities, and the actual market value or wholesale price of every of them, as the case may require."

Confessedly the appraiser has no jurisdictional powers beyond this prescription of his duties. The invoice is before him. Congress has said in numerous provisions prescribing the form and requirements of that and every valid invoice in detail that it shall set forth the "actual market value" of the merchandise, and shall "include and specify" separately the packages, "and also" the costs, charges, etc. Wherever the latter are intended to be included they are literally described in detail. In this provision, the grant and definition of the powers and duties of the appraiser include only the appraisement of "the actual market value" of the merchandise. Nothing is said, no grant of jurisdiction is given, as to "costs" or "charges." Indeed, the section itself bears the same interpretation, for it speaks of the "actual market value" of each "yard," "parcel," and "quantity," and "every of them," which obviously it would be an absurdity to hold included packages and charges in all or many instances incident to the whole invoice. So it appears that neither in section 8, wherein is defined what shall be submitted to the appraiser for appraisement, nor in section 10, which defines and prescribes his powers, is there any power vested in him over costs, charges, or expenses.

Section 13 governs the report of the appraiser to the collector. It charges that he "shall report to the collector his decision as to the *value* of the merchandise appraised." And be it particularly noted that it is herein prescribed that where there is no appraiser at a port of entry the officer charged with the "estimating and collection of duties," which is the corresponding officer to the collector, that "the certificate" of such officer "of the *dutiable* value of any merchandise required to be appraised, shall be deemed and taken to be the appraisement of such merchandise." In this paragraph the distinction is drawn between the duties of the appraiser to appraise the actual market value of imported merchandise and the duties of the collector to affix the dutiable value of imported merchandise. The idea is further carried into the statute wherein it is further provided that "if the collector shall deem the appraisement * * * too low, he may * * * appeal to reappraisement." Then follows an appeal to re-appraisement. As the authority and power of the board is coextensive with the authority and power of the appraiser in reviewing his decision as to the market value of the goods, those provisions are significant of what Congress intended he should do under the customs administrative law. It is not provided in the

statute and it has never been contended that the Board of General Appraisers in a reappraisement case pass upon the value of packages and coverings or costs, charges, and expenses, or include them within the appraised value. As with the appraiser, they oftentimes make report to the collector of suggestions, but it is not their legal duty or power.

Indeed, while the learned general appraisers below rested the decision herein as to the finality of appraisal and its binding effect upon the collector upon this section, it would seem that the very provision quoted draws the distinction here made between the duties of the appraiser and collector and excludes all idea of the appraiser's action on an item relating to packing or other costs and charges being final or within his power. The provision reads:

SEC. 13. * * * The decision of the appraiser, or the person acting as such (in case where no objection is made thereto, whether by the collector or by the importer, owner, consignee, or agent), or the single general appraiser in case of no appeal, or of the board of three general appraisers, in all reappraisement cases, shall be final and conclusive against all parties and shall not be subject to review in any manner for any cause in any tribunal or court, *and the collector or the person acting as such shall ascertain, fix, and liquidate the rate and amount of the duties to be paid on such merchandise, and the dutiable costs and charges thereon, according to law.*

After finality of the appraisal and appraiser's action is established by lapse of time, the very section vests in the collector power to thereupon proceed to "ascertain, fix, and liquidate the rate and amount of the duties to be paid on such merchandise, *and the dutiable costs and charges thereon, according to law.*" What more ample grant of authority could be couched in language more appropriately placed to show that what are costs and charges are to be "ascertained," "fixed," and determined by the collector and not the appraiser, and that Congress did not deem such entered into the "actual market value" that became final after final appraisal?

Section 14 prescribes the duty of the collector. It states:

That the decision of ~~the collector as to the rate and amount of duties chargeable~~ upon imported merchandise, including [his decision upon] *all dutiable costs and charges*, and as to all fees and exactions of whatever character * * * shall be final and conclusive * * *.

Reading section 14, defining the duties of the collector, together with sections 10, 11, and 13, defining the duties of the appraising officers, clearly distinguishes the respective powers and duties of each.

Section 14 makes the decision of the collector alone final and conclusive as to all dutiable costs and charges. Section 13, expressly, in effect excepts such from the finality of the appraiser's decision, by providing that upon such finality the collector shall proceed to affix and determine such costs and charges, and sections 10 and 11, which alone vest the appraiser with and define his powers, give him no power over costs and charges. It is not a little difficult to understand

how such provisions in an act creating certain statutory officers and defining their duties, which must be strictly construed, can be held to have vested in the appraiser power to appraise costs and charges and deny the collector any power of decision over such.

Section 14 is in all material particulars identical with section 2931 of the Revised Statutes as construed with section 2906, which is in all respects similar to section 10 of the customs administrative law.

In *Oberteuffer v. Robertson*, *supra*, the Supreme Court said:

The addition of the items for cartons and packing was no part of the duty or function of the appraiser, acting under section 2906, to appraise the foreign-market value of the goods. Although, in form, the appraiser added the items for cartons and packing, the action of the customhouse was only a decision of the collector, under section 2931, that the cartons and packing were dutiable *costs and charges*.

Grant in this case that 60 centimes were properly added to make market value by the appraiser, certainly no one can dispute that the 40 centimes added by the collector were a part at least of packing charges or costs and as such strictly within his legal power to determine should be added to the *dutiable* value of the goods. In such view the question here is, were they properly a part of such and not did he have the legal power to so include them as a part of the *dutiable* value. Everyone concedes that if he had the legal power he acted rightly, and if not the importer escapes payment of just dues owing the Government by concealment.

The facts of this case seem to bring it precisely within the case of *Beard v. Porter* (124 U. S., 437). The item in controversy in no way affects the appraised value of the goods. The appraisement is not attacked or questioned.

It does not appear that such second liquidation was based at all upon any increase of the values of the *goods* from the invoice values.

The addition and reliquidation concern solely the addition to or inclusion within the *dutiable* value of the goods of an item of costs in packing, 40 centimes for inside boxes. It was therefore a matter strictly within the collector's duties and in no wise affected the appraiser's decision as to the value of the goods *per se*, 5,267.15 francs, which is accepted as correct in the reliquidation. See also *United States v. Passavant* (169 U. S., 16).

Section 18 provides upon what duty "shall be assessed." It is, therefore, the section defining, not actual market value, which has been previously defined, but *dutiable* value. It states:

Duty shall be assessed upon the actual market value or wholesale price thereof [and] that such actual market value [upon which duty shall be assessed] shall be held to be the price at which such merchandise is freely offered for sale to all purchasers in said markets, in the usual wholesale quantities, and the price which the manufacturer or owner would have received, and was willing to receive, for such merchandise when sold in the ordinary course of trade in the usual wholesale quantities, including the value of all cartons, cases, crates, boxes, sacks, casks, barrels, hogs-

heads, bottles, jars, demijohns, carboys, and other containers or coverings, * * * and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment, * * *.

By the phrase, "*such* actual market value," "*such*" refers what follows back to "the actual market value" upon which "*duty shall be assessed*" as the *dutiable* "actual market value." This section refers intrinsically and expressly to the collector's duty and actions. The *appraiser* does not *assess duty* upon the imported merchandise; he under section 10 *appraises* the merchandise and the collector alone under sections 13 and 14 *assesses the duty*, and, in so doing, takes into consideration and includes or excludes what may or may not in his judgment amount to coverings or costs, charges, and expenses.

The previous provisions of the statute having in great detail provided that in the invoices and entries the actual market value of the merchandise, as bought and sold in the country of exportation, should be invoiced and entered separately from the coverings and the value thereof and the costs, charges, and packages and the value thereof; and it likewise being previously provided that the appraiser should appraise the value of the merchandise only and report the same to the collector without vesting in him by statute, which is the limit of his authority, the right to appraise the costs or charges, etc. and it likewise being previously provided by the statute that the collector must decide as to what is costs, charges and expenses, section 18 following defines what is *dutiable* value by enumerating all the factors upon which duty "shall be assessed." In no other provision of the customs administrative law is *dutiable* value defined which includes costs and charges not incident to the goods in the foreign wholesale markets, and unless this paragraph does so define there is no authority in the law to include as *dutiable* value in any case as a part of the imported merchandise either coverings, etc., or charges, etc.

The latter part of the provision is not a definition of actual market value, but a reference to the use of those terms in other parts of the statute and the definition thereof as they are "defined in this act," and extends such definitions to include not alone the subject-matter of the actual importation but of "similar merchandise comparable in value therewith." This is a rule of appraisement and not a definition of value. The purpose of this provision was to allow appraising officers in determining value and actual market value and the wholesale price to consider not alone the individual importation and identical merchandise but similar merchandise comparable in value therewith. It renews the proviso to paragraph 16 of the act of 1842, which, in its incorporation in section 19 of the customs administrative law of 1890, as amended in 1897, confined the examinations of appraisers to identical goods, extending such examinations to "similar

merchandise comparable in value therewith," and further extended that latitude of performance of official duty to wherever it was exercised under the whole "act" rather than "section" 18 as was prescribed by the amended act.

The distinction between actual market value, which relates alone to the value of the merchandise *per se*, and dutiable value, which includes that, together with costs and charges, and all other factors upon which duty "shall be assessed" as prescribed in section 18, and that section alone, is clearly drawn by the provisions of section 13.

In this section, as in all other sections of the act, Congress, when speaking of and referring to the merchandise *per se* only (which in the act is the merchandise bought and sold in usual wholesale quantities in the usual course of trade in the country of exportation), uniformly uses the words "the merchandise," or "such merchandise," or the equivalent; and, whenever Congress includes or intends to include "costs and charges," it expressly *mentions such*, as well as "the" or "such" "merchandise." So, after Congress by section 7 empowers the collector to cause to be appraised "such merchandise" (not including costs and charges), and, after the appraiser under section 10 proceeds to "ascertain, *estimate*, and *appraise* * * * the merchandise" (not including costs and charges), the collector may, under section 13, if he "shall deem the *appraisement* of any imported *merchandise*" (not including costs and charges) "too low, * * * appeal to reappraisement." The section continues: "In such cases the general appraiser and boards of general appraisers shall proceed * * * to ascertain, *estimate*, and determine the dutiable value of the imported *merchandise*" (not of costs and charges). "Costs and charges" were not submitted to the appraiser for appraisement under section 7, were not a part of the appraisement under section 10, and not the subject of appeal by the collector who appeals solely from the "appraisement" under section 13.

What an incongruous act this would be if construed that costs and charges were included in the appraisement and made final by the decisions of the appraisers under the first part of section 13, while, at the same time, the latter part of that section directs that the collector shall "ascertain, fix, and liquidate" "the dutiable costs and charges," which "decision" by the collector is by the following sentence, the first of section 14, made final as to "all dutiable costs and charges" in the absence of appeal.

Were there nothing more in the act to show that the "dutiable market value" made final by section 13 refers alone to the merchandise *per se*, as above defined, the last sentence of the section, that *the collector* shall "ascertain" and "fix * * * all the dutiable costs and charges," would suffice. Certainly Congress did not

intend such to be ascertained, etc., and be made final by both the decision of the appraiser and collector.

In the same section we have "dutiable" market value "ascertained and *determined*" by the appraiser and "dutiable" costs and charges to be "ascertained and *fixed*" by the collector. How can it be said Congress intended the former should perform this office thus prescribed for the latter? What warrant is there in this section for holding that the former must or can perform the latter duty? If the "costs and charges" were included in "appraisement," then dutiable value would be an *appraised* open-market value, and that value the subject of contest on appeal to reappraisement regardless of actual cost. They are not and never have been held such. They are the subject of ascertainment, fixing, and determination not of a *value*, but of actual *cost*. This section, therefore, speaks only of the value of the merchandise *per se*, which becomes "dutiable value" because binding upon the collector as one of the factors in his determination of the value upon which duty shall be assessed. Such, however, is but *one* of the factors going to make up dutiable value of every invoice of "*imported merchandise* * * * subject to an ad valorem rate of duty" under section 18 of the act, which section alone enumerates all the factors or values which must be determined and fixed by the collector as the basis upon which duty "shall be assessed," or dutiable value.

While in the foregoing we have assumed that the appraisement may legally extend beyond a unit value to the aggregate value of the merchandise, such is not here decided. That may be and has here been assumed as unnecessary of decision in this case.

The whole framework of the customs administrative law, therefore, it would seem, is in harmony and differentiates between actual market value and *dutiable* actual market value, making the former the duty of the appraising officer, and the decision of and ascertainment of the latter the duty of the collector.

There is nothing in *United States v. Francklyn* (4 Ct. Cust. Appls., 54; T. D. 33306) contrary to the above suggestions. Indeed, it was said in that case:

As affecting the question here involved, subsection 18 of section 28 of the present tariff act is not to be distinguished from section 19 of the customs administrative act of 1890.

The whole question in the *Francklyn* case was whether or not the value of the coverings was included in the value of the cement for dutiable purposes. It was held by the court, *under facts of the particular case*, that they were properly so included. The question of the respective rights and duties of appraising officers and collectors was in no sense directly or indirectly involved.

The case of *United States v. Calhoun* (184 Fed., 499) is more an authority for the above contention than against it. Therein Judge Hand draws a concise distinction between the duties of the appraiser and the duties of the collector. That case is an authority that the collector can not appraise, but that his duties are those pertaining to liquidations alone, which may involve the addition or rejection of coverings or charges, according as the facts may develop that they were or were not included in the value of the merchandise as purchased, or may include the application of some other rate of duty to the importation than that previously applied.

Reading all of the provisions of the law together so as to give harmonious effect to the whole act and adopting that construction that continues in the Government power to recoup its revenues against fraudulent invoices after appraisement becomes final without the least invasion of the rights of any honest importer, the board must be held to have erred.

We would be quite content to rest our conclusion herein upon this analysis of the existing statutes without further extending a discussion already beyond requirements; but the urgent insistence of counsel for appellees, supported by certain exceedingly well considered opinions by the board that the legislative and judicial history of the customs administrative act leads to a contrary conclusion and the great importance of the subject demand some review of these subjects.

The provisions of section 16 of the act of 1842 and of the Revised Statutes ancestral to those of the customs administrative law now in effect, so far as relating to and controlling the issues in this and previous like cases are essentially, if not literally, the same as the latter.

Section 16, in so far as pertinent, read (A and B are our segregations for facility of consideration) as follows:

(A) *Sec. 16. And be it further enacted*, That in all cases where there is or shall be imposed any ad valorem rate of duty on any goods, wares, or merchandise imported into the United States, and in all cases where the duty imposed shall by law be regulated by, or directed to be estimated or based upon, the value of the square yard, or of any specific quantity or parcel of such goods, wares, or merchandise, it shall be the duty of the collector within whose district the same shall be imported or entered to cause the actual market value or wholesale price thereof, at the time when purchased, in the principal markets of the country from which the same shall have been imported into the United States, or of the yards, parcels, or quantities, as the case may be, to be appraised, estimated, and ascertained, and to such value or price, to be ascertained in the manner provided in this act, shall be added all costs and charges, except insurance, and including, in every case, a charge for commissions at the usual rates, as the true value at the port where the same may be entered upon which duties shall be assessed.

(B) And it shall, in every such case, be the duty of the appraisers of the United States, and every of them, and every person who shall act as such appraiser, or of the collector and naval officer, as the case may be, by all reasonable ways and means in his

or their power, to ascertain, estimate, and appraise the true and actual market value and wholesale price, any invoice or affidavit thereto to the contrary notwithstanding, of the said goods, wares, and merchandise, at the time purchased, and in the principal markets of the country whence the same shall have been imported into the United States, and the number of such yards, parcels, or quantities, and such actual market value or wholesale price of every of them, as the case may require; * * *.

Sec. 5, Statutes at Large, 563.

It will be noted that our subdivision A provided for the addition of costs, charges, and *commissions* by the collector, stating of such that "it shall be the duty of the collector." (This provision omitting commissions later became in substance a part of section 13 of the customs administrative law.)

It will be noted that our subdivision B defined the duties of appraising officers and that the same has no reference whatsoever to costs, charges, or commissions. (This provision later became section 10 of the customs administrative law.)

An appeal in classification cases from the decision of the collector was allowed and the decision of the collector of customs made final as to the rate and amount of duty to be paid "and the dutiable costs and charges thereon," in the absence of appeal, by sections 14 and 15 of the act of 1864 (13 Stat. L., 214, 215).

Section 15 read:

And be it further enacted, That the decision of the respective collectors of customs as to all fees, charges, and exactions of whatever character, other than those mentioned in the next preceding section, * * * shall be final and conclusive against all persons interested in such fees, charges, or exactions. * * *

The corresponding provisions of the Revised Statutes in the course of enactment preceding the customs administrative law were as follows:

SEC. 2902. It shall be the duty of the appraisers of the United States, and every of them, and every person who shall act as such appraiser, or of the collector and naval officer, as the case may be, by all reasonable ways and means in his or their power, to ascertain, estimate, and appraise the true and actual market value and wholesale price, any invoice or affidavit thereto to the contrary notwithstanding, of the merchandise, at the time of exportation, and in the principal markets of the country whence the same has been imported into the United States, and the number of such yards, parcels, or quantities, and such actual market value or wholesale price of every of them, as the case may require. * * *

SEC. 2906. When an ad valorem rate of duty is imposed on any imported merchandise, or when the duty imposed shall be regulated by, or directed to be estimated or based upon, the value of the square yard, or any specified quantity or parcel of such merchandise, the collector within whose district the same shall be imported or entered shall cause the actual market value, or wholesale price thereof, at the period of the exportation to the United States, in the principal markets of the country from which the same has been imported, to be appraised, and such appraised value shall be considered the value upon which duty shall be assessed.

SEC. 2907. In determining the dutiable value of merchandise, there shall be added to the cost, or to the actual wholesale price or general market value at the time of exportation in the principal markets of the country from whence the same has been

imported into the United States, the cost of transportation, shipment, and transshipment, with all the expenses included, from the place of growth, production, or manufacture, whether by land or water, to the vessel in which shipment is made to the United States; the value of the sack, box, or covering of any kind in which such merchandise is contained; commission at the usual rates, but in no case less than two and a half per centum; and brokerage, export duty, and all other actual or usual charges for putting up, preparing, and packing for transportation or shipment. * * *

SEC. 2931. On the entry of any vessel, or of any merchandise, the decision of the collector of customs at the port of importation and entry, as to the rate and amount of duties to be paid on the tonnage of such vessel or on such merchandise, and the dutiable costs and charges thereon, shall be final and conclusive against all persons interested therein. * * *

It will be noted that in the Revised Statutes the determinative duties of the collector and appraiser, those of both of which were prescribed in section 16 of the act of 1842, were divided, that of the appraiser being set forth in section 2902 of the Revised Statutes and that of the collector in sections 2906, 2907, and 2931.

Epitomized, section 2902 prescribed the duties of appraising officers, while section 2906 directed that the collector should cause an appraisement to be made; section 2907 expressly empowered him to add to the appraised value determined by the appraising officers under section 2902 all costs, charges, and expenses, etc., while section 2931 expressly made the decision of the collector final as to all dutiable costs and charges upon imported merchandise.

These provisions after the act of 1883 were essentially and almost literally carried into the various provisions of the administrative law.

In section 7 it is, as it was in section 2906, provided:

The collector within whose district any merchandise may be imported or entered, whether the same has been actually purchased or procured otherwise than by purchase, shall cause the actual market value or wholesale price of such merchandise to be appraised.

By section 10 it is, as it was in section 2902, provided:

SEC. 10. That it shall be the duty of the appraisers of the United States, and every of them, and every person who shall act as such appraiser, or of the collector, as the case may be, by all reasonable ways and means in his or their power to ascertain, estimate, and appraise (any invoice or affidavit thereto or statement of cost, or of cost of production to the contrary notwithstanding) the actual market value and wholesale price of the merchandise at the time of exportation to the United States, in the principal markets of the country whence the same has been imported, and the number of yards, parcels, or quantities, and actual market value or wholesale price of every of them, as the case may require.

This provision is *pro tanto* identical in language with section 2902 of the Revised Statutes and our subdivision "B" of the act of 1842, defining the duties of appraising officers.

By section 13 of the customs administrative law it is provided, as to final appraisement or re-appraisement as in section 2907, that—

The collector or person acting as such shall ascertain, fix, and liquidate the rate and amount of duties to be paid on such merchandise, and the dutiable costs and charges thereon, according to law.

This is essentially and almost literally the provision of section 2907 of the Revised Statutes and our subdivision "A" of the act of 1842.

Finally, by section 14 of the customs administrative law, it is provided—

That the decision of the collector as to the rate and amount of duties chargeable upon imported merchandise, including all dutiable costs and charges, and as to all fees and exactions of whatever character, * * * shall be final and conclusive.

This is essentially, if not literally, the provisions of sections 14 and 15 of the act of 1864 and section 2931 of the Revised Statutes.

What was the judicial construction of these former acts?

Of these provisions the Supreme Court in *Oberteuffer v. Robertson* (116 U. S., 499), said:

The addition of the items for cartons and packing was no part of the duty or function of the appraiser, acting under section 2906, to appraise the foreign market value of the goods. Although, in form, the appraiser added the items for cartons and packing, the action of the customhouse was only a decision of the collector, under section 2931, that the cartons and packing were dutiable costs and charges.

This legislative status was the subject of the *obiter* expressions in *G. A. 6082* (T. D. 26514), majority opinion by Judge Waite, Judge Somerville dissenting, the reasoning of which majority opinion was urged with much force by counsel for appellees in this court, wherein is asserted a difference in the early law from the present. That decision was rested upon the statement that prior to the customs administrative act of 1890 the laws in force required that the various charges should be added to the costs or market value, whereas by the customs administrative law, as subsequently amended, such is not required. A comparison of all the acts *in pari materia* shows that this assumption by Judge Waite as to former acts must be limited to the subject matter before him, to wit, commissions, and that his conclusions as to costs and charges and commissions under the customs administrative law were subsequently in effect disapproved by superior authority. *N. Erlanger, Blumgart & Co. v. United States* (154 Fed., 949). The opinion follows with a quotation from section 16 of the act of 1842, which is our "A," *supra*, and which expressly requires the collector to add costs, charges, and commissions. This is followed in contrast by the quotation of sections 10 and 19 of the present law upon that subject and the statement by the learned general appraiser for the board that there is therein no requirement that the collector shall add costs and charges. This position overlooks the fact that section 10 is our part "B" and not "A" of the act of 1842, while his previously quoted portion of section 16 is in effect incorporated in and made a part of section 13 of the customs administrative law. By both our part "A" of section 16 of the act of 1842 and the concluding part of section 13

of the customs administrative law it is statutorily required that "the collector or the person acting as such shall *ascertain, fix, and liquidate* the rate and amount of the duties to be paid on such merchandise *and the dutiable costs and charges thereon, according to law,*" and negatives the alleged difference in the statutes. While the corresponding provision of the Revised Statutes, section 2907, does not declare in terms what officer shall add costs, charges, and expenses to the appraised value, it was declared in *Oberteuffer v. Robertson* that section 2931 of the Revised Statutes, which is essentially the same as, if not identical with section 14 of the customs administrative law, vested that power solely in the collector of customs.

It will be further noted that section 2906 of the Revised Statutes, which is *pro tanto* in all material parts identical with section 10 of the customs administrative law, which alone defines the duties of the appraising officers, was declared by the Supreme Court in *Oberteuffer v. Robertson, supra*, not to empower the appraising officer, but to empower the collector alone to add costs, charges, and expenses.

It will likewise be noted that the question in G. A. 6082 (T. D. 26514), majority opinion by Judge Waite, was essentially different from the question in this record. This is a fact which should be clearly borne in mind. That case with all the other commissions cases, which were the subject of extended litigation covering a period of many years before the board and in the courts, involved questions where the collector had added an item upon the invoice which the appraiser had included within the appraised value of the merchandise *per se* in order to make market value. Note particularly that in those cases the appraisement included the disputed item, and the question was whether or not the collector had the right to go into the appraisement as found by the appraiser and take an item therefrom and add it to the appraised value as found by the appraiser. This case is entirely different.

The collector here did not invade the findings of the appraiser by segregating therefrom an item which the appraiser had included to make market value, nor did the collector without evidence, save the invoice, add an item upon the invoice to the appraised value, but upon evidence in the record disclosing an item of 40 centimes not of the *per se* value of the goods, nor of their value as sold in usual wholesale quantities in the country of exportation, an item confessedly of packing charges which had not been considered by the appraiser and which was not before him at the time of appraisement, but which was before the collector alone long thereafter upon the admissions of the importer himself, the collector added as packing charges. There was no interference with or change of the invoice, entered or appraised valuation. So we have here no question of the collector taking an item out of the *appraised* value or in any wise affecting, modifying,

or changing the appraised value, but the simple exercise by the collector of his statutory right of adding to the appraised value to make *dutiable* value that which all parties to the record concede to be an item of packing charges—cartons—one of the enumerated classes of such by sections 13, 14, and 18 made the subject of the collector's decision.

Moreover, section 18 does not define the official duties of either appraisers or collectors. It prescribes a rule of assessment in the first instance, defining upon what duty shall be assessed; and, in the concluding paragraph, a rule of appraisement authorizing appraisers to consider similar merchandise comparable in value.

The duties of the appraisers, so far as determining value is concerned, are prescribed, limited, and defined by section 10. That section is *verbatim et literatim* taken from section 16 of the act of 1842 and section 2902 of the Revised Statutes, of which the Supreme Court in *Oberteuffer v. Robertson*, *supra*, said:

The addition of the items for cartons and packing was no part of the duty or function of the appraisers. * * *

The duties of the collector, so far as here pertinent, are prescribed and limited by sections 13 and 14, which were sections 14 and 15 of the customs administrative law of 1890, as amended in 1897, and as considered by the Supreme Court in *United States v. Klingenberg* (153 U. S., 100–104), and in all essential particulars the same as section 2931 of the Revised Statutes. Sections 13 and 14 of this act and 13, 14, and 15 of the prior act are, so far as here pertinent, *in haec verba*. Of these the Supreme Court in *United States v. Klingenberg*, *supra*, said:

Under a proper construction of sections 14 and 15 of the act of June 10, 1890, it can not be held that the right of review by the Circuit Court is limited and confined, as contended by the appellee, to the two subjects of classification and the rate of duty. By section 14 the collector's decision on rate and amount of duties, including all dutiable costs and charges, and as to all fees and exactions of whatever character (except duties on tonnage), may be the subject of appeal to the Board of General Appraisers. The subjects of review by the Circuit Court, provided for by section 15, extend to all questions of law and fact in respect to which the Board of General Appraisers have appellate jurisdiction, except the decision of that board as to the dutiable value of merchandise, which is provided for by section 13, and is made conclusive against all parties interested.

The court here declared that the determination of costs and charges was not an appraiser's duty, final under section 14 (here 14), but was a collector's function under section 15 (here 14), and therefore reviewable by the courts.

So in *Oberteuffer v. Robertson*, *supra*, speaking of section 2931 of the Revised Statutes, the Supreme Court said:

Although, in form, the appraiser added the items for cartons and packing, the action of the customhouse was only a decision of the collector, under section 2931, that the cartons and packing were dutiable costs and charges.

The Oberteuffer case defining the appraiser's duties, and that and the Klingenberg cases declaring those of the collector, plainly settle what of the rules prescribed by section 18 shall be performed by these respective officials, and that the ascertainment and fixing of dutiable "costs and charges" are solely within the powers of the collector and accord with the deductions previously drawn by us from the language of the act.

Whatever construction may be put upon the latter part of section 18, declaring that the words "value," or "actual market value," or "wholesale price" whenever used in this act shall be construed to be "the actual market value or wholesale price of such, or similar merchandise comparable in value therewith, *as defined in this act*," whether such be construed simply as a rule extending the classes of goods that may be examined by appraisers or as a reference definition of "actual market value," the extension of that reference from the provisions of the "section" to those of the whole "act" by the act of 1909 would seem to conclude the question that Congress had written the definitions of "actual market value" therein referred to, not in section 18 alone, if at all, but also in other parts of the act. This exact provision in the amended act (section 19 customs administrative law of 1890, as amended in 1897) read:

That the words "value" or "actual market value" whenever used in this act * * * shall be construed to be the actual market value or wholesale price *as defined in this section*.

"This section" was "section 19" (here 18). By amendment in 1909 these words were made to read "*as defined in this act*." Why did Congress change the reference from "this section" to "this act"? It could be for no other reason than that Congress deemed that it had, if you please, defined actual market value in other places in the act than in this "section" and that the words should take their meaning not from the language of section 18 alone, if at all, but from the whole act. Now, it so happens that "actual market value" is defined in section 3, and at least four times in section 5, not to say that it is distinguished from "costs and charges" in sections 10 and 13 of "this act." At least we have for this the authority of the Supreme Court, which in the Oberteuffer case looked to the provisions precisely alike those of section 5 to, and therefrom did, determine what Congress meant by the words "actual market value." The court then proceeded to further declare that section 2902 of the Revised Statutes, which was identical with section 10 of the present act, did not empower the appraiser to consider costs and charges. Then followed the Klingenberg case, where sections 13, 14, and 15 of the here amended act, which are identical with sections 13 and 14 of this act, were construed. The court there declared of section 14 as to "costs and charges," "this section clearly allows and provides for

an appeal by the importer from the decision of the collector as to both rate and amounts of duty, *as well as dutiable costs and charges*, and as to all fees and exactions," and pointed out that if such were within the appraiser's duties, under section 13, they would become final and conclusive under that section and not be the subject of an appeal from the collector's decision.

With these constructions of the other parts of the "act" before it Congress reenacted them literally, and in its changes in section 18 expressly by amendment provided that these adjudicated definitions should be considered in determining what Congress meant by the words "actual market value." How, therefore, can we now say they should be excluded from that consideration?

If, therefore, we respect that fundamental statutory principle of reading all parts of the act together and adopting that construction that harmonizes the whole and gives some effect to all parts of the act, but one conclusion follows:

It would seem to us that in the interest of both fairness to honest and the protection of the revenues against dishonest importers this must be a welcome rule.

If we hold that an appraising officer's return can include costs and charges, he may by any sort of general return which conceals the fact of such inclusion defeat any inquiry into such by an appeal directed at his decision, as there would be no remedy for the importer for such by direct appeal from the collector's decision. See *N. Erlanger, Blumgart & Co. v. United States* (154 Fed., 949).

On the other hand, if there were fraud as to such upon part of the importer, undiscovered for the brief period of appealable appraisement, the Government would be without remedy.

We think that the conclusion in this very important case not only accords with the interpretation of the law by the Supreme Court extending over a period of many years, and gives effect to and harmonizes all provisions of the act, prevents injustice to honest importers, and conserves the powers of recoupment in the Government against dishonest ones.

Reversed.

DISSENTING OPINION.

MONTGOMERY, *Presiding Judge*: I find myself unable to assent to the conclusion reached by the majority of the court in this case. I take it that it is conceded that a decision of the appraiser acting as such, and proceeding within correct principles of law in a matter committed to his judgment, is final and concludes both the importer and the collector.

I think there is no disagreement either that in carrying into effect the provisions of section 7, which provides that merchandise shall not

be admitted at less than invoice or entered value, the collector must of necessity ascertain what the invoice and entered value is, and if it consists of the *per se* value of the goods, and also the value of cartons, cases, charges, etc., that these are the subject of ascertainment by him. See *United States v. Passavant* (169 U. S., 16).

The real question in this case is whether the duty imposed upon the appraiser to fix the value of imported merchandise includes the duty of appraising as a part of the value the cost of cartons, cases, and other charges. The importers contend that the value to be fixed by the appraiser does include these items, and that therefore in the absence of an appeal the collector is concluded from going back of the finding of the appraisers. The Government, on the other hand, distinguishes between the *per se* cost of the goods imported and the charges mentioned.

The duty is therefore devolved upon the court of construing the statute. The statute itself, in the absence of uncertainty or ambiguity, is our guide. If there be ambiguity or conflict in its provisions, it is our duty to reconcile them as well as may be.

Let us take the statute as we find it. Subsection 10 of section 28 of the act of 1909 reads as follows:

That it shall be the duty of the appraisers of the United States, and every of them, and every person who shall act as such appraisers (or of the collector, as the case may be), by all reasonable ways and means in his or their power to ascertain, estimate, and appraise *the actual market value and wholesale price of the merchandise at the time of exportation to the United States, in the principal markets of the country whence the same has been imported*, and the number of yards, parcels, or quantities, the actual market value or wholesale price of every of them, as the case may require.

Subsection 18 provides:

That whenever imported merchandise is subject to an ad valorem rate of duty, or to a duty based upon or regulated in any manner by the value thereof, the duty shall be assessed upon *the actual market value or wholesale price thereof, at the time of exportation to the United States*, in the principal markets of the country from whence exported; that such actual market value *shall be held to be the price at which such merchandise is freely offered for sale to all purchasers in said markets, in the usual wholesale quantities, and the price which the manufacturer or owner would have received, and was willing to receive, for such merchandise when sold in the ordinary course of trade in the usual wholesale quantities, including the value of all cartons, cases, crates, boxes, sacks, casks, barrels, hogsheads, bottles, jars, demijohns, carboys, and other containers or coverings, whether holding liquids or solids, and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States, * * ** That the words "*value*," or "*actual market value*," or "*wholesale price*," whenever used in this act, or in any law relating to the appraisement of imported merchandise, *shall be construed to be the actual market value or wholesale price of such, or similar merchandise comparable in value therewith, as defined in this act.*

It is difficult to conceive where these two sections, read by themselves, can be said to be ambiguous. One section imposes the duty upon the appraiser of appraising the actual market value and whole-

sale price of merchandise at the time of exportation to the United States. Another section says that the actual market value shall be construed to be the "actual market value or wholesale price of such or similar merchandise * * * as defined in this act."

We turn then to provisions of the act to ascertain if there be any definition of actual market value, and we find in the same subsection Congress dealing with actual market value, and declaring that "duty shall be assessed upon the actual market value or wholesale price thereof," and that "such actual market value shall be held to be the price at which such merchandise is freely offered for sale," etc., "including the value of all cartons, cases," etc. Elaboration does not add to the force of the language employed. Actual market value is to be appraised. Actual market value *whenever* used in the act is to mean such actual market value as defined. The defined actual market value is actual market value which includes the value of cartons, cases, charges, etc., and no other actual market value. It seems to me that there is no escape from this conclusion.

But in the main opinion it is said of subsection 18:

It states: "Duty shall be assessed upon the actual market value or wholesale price thereof" and "that *such* actual market value" (upon which duty shall be assessed) "shall be held to be the price," etc. * * * By the phrase "*such* actual market value," "such" refers what follows back to "the actual market value" upon which "*duty shall be assessed*," as *dutiable* "actual market value." This section refers intrinsically and expressly to the collector's duty and actions.

And throughout the opinion an attempt is made to distinguish between the actual market value as such and so-called *dutiable* actual market value. Such purpose, however, is not indicated by the paragraph itself. In the first place, one has to import the word "dutiable" bodily into the text in order to justify such construction. It is true that the provision reads that the duty shall be assessed upon the actual market value, but it proceeds to define then what this actual market value is, and is the only place in the statute in which there is so specific a definition of actual market value.

But this is not all. Congress has not made any such distinction between assessable market value and dutiable market value as might be inferred from the reasoning of the main opinion. Quite the reverse. If we turn to subsection 13 we find:

If the collector shall deem the appraisement of any imported merchandise too low, he may, within sixty days thereafter appeal to reappraisement, which shall be made by one of the general appraisers, or if the importer, owner, agent, or consignee of such merchandise shall be dissatisfied with the appraisement thereof, and shall have complied with the requirements of law with respect to the entry and appraisement of merchandise, he may within ten days thereafter give notice to the collector in writing of such dissatisfaction. The decision of the general appraiser in cases of reappraisement shall be final and conclusive as to the *dutiable* value of such merchandise.

And again in the same section, after providing for an appeal and referring to the action of the board, it is provided:

In such cases the general appraiser and boards of general appraisers shall proceed by all reasonable ways and means in their power to ascertain, estimate, and determine the *dutiable* value of the imported merchandise. * * *

And then providing that—

The decision of the appraiser, or the person acting as such (in case where no objection is made thereto either by the importer, owner, consignee, or agent) or the single general appraiser in case of no appeal, or of the board of three general appraisers in all reappraisal cases shall be final and conclusive against all parties and shall not be subject to review in any manner for any cause in any tribunal or court. * * *

So that it is apparent that it will not do to say that the Congress has, in the act in question, distinguished between actual market value as defined by section 18 and *dutiable* market value.

But it is further suggested that the latter part of subsection 13, defining the duties of the collector, conferred upon him the duty of ascertaining the costs and charges dutiable by law. The clause reads as follows:

The collector or the person acting as such shall ascertain, fix, and liquidate the rate and amount of the duties to be paid on such merchandise, and the dutiable costs and charges thereon, according to law.

It must at least be conceded by anyone who reads this clause that it is quite as consistent with the view that the appraisers fix as dutiable costs and charges the actual market value as defined by subsection 18 as to hold that it confers the duty of fixing the costs and charges upon the collector. The duty imposed upon the collector here is a duty to ascertain, fix, and liquidate the rate and amount of duties. To be paid on what? On such merchandise and on the dutiable costs and charges thereon according to law. Now such merchandise, and the dutiable costs and charges thereon according to law, all come under one head as the actual value for dutiable purposes as fixed by the Board of General Appraisers. It will not do to say that the collector liquidates the *rate and amount of dutiable costs and charges*. What he liquidates is the rate and amount of *duties*, and it is by a strained construction that this clause is given any other meaning.

Subsection 14 is also cited, which reads:

That the decision of the collector as to the rate and amount of *duties chargeable* upon imported merchandise, including all dutiable costs and charges, and as to all fees and exactions of whatever character, * * * shall be final and conclusive. * * *

This, likewise, is open to a construction wholly consistent with the views I have expressed as to subsection 10 and subsection 18, and more consonant therewith than with any other view that could be maintained. The decision of the collector here referred to is as to the *rate and amount* of duties chargeable upon imported merchandise, which rate and amount of duties are chargeable upon such imported merchandise, including the dutiable costs and charges, the assessment

of which is provided for by the other provisions of the statute. The only other subject as to which the decision of the collector is made conclusive is indicated by the conjunction "and." His decision is therefore conclusive under the terms of this section as to "the rate and amount of duties * * * and as to all fees and exactions of whatever character," which clearly refer to fees and exactions for service.

Reliance is placed upon the cases of *Oberteuffer v. Robertson* (116 U. S., 499), *Beard v. Porter* (124 U. S., 437), and *United States v. Passavant* (169 U. S., 16). And it is said that these authorities distinguish between appraisement and ascertainment; that the value of the goods *per se* is to be appraised; but that the charges are simply ascertained.

In *Oberteuffer v. Robertson* the court had under consideration a statute which provided (sec. 2906 of the Revised Statutes) that—

When an ad valorem rate of duty is imposed on any imported merchandise, or when the duty imposed shall be regulated by, or directed to be estimated or based upon, the value of the square yard, or of any specified quantity or parcel of such merchandise, the collector within whose district the same shall be imported or entered shall cause the actual market value, or wholesale price thereof, at the period of the exportation to the United States, in the principal markets of the country from which the same has been imported, to be appraised, and such appraised value shall be considered the value upon which duty shall be assessed.

By the act of July 28, 1866, a section was added which provided—

In determining the dutiable value of merchandise, there shall be added to the cost, or to the actual wholesale price or general market value at the time of exportation in the principal markets of the country from whence the same has been imported into the United States, the cost of transportation, shipment, and transshipment, with all the expenses included, from the place of growth, production, or manufacture. * * *

And it was provided that—

All additions made to the entered value of merchandise for charges shall be regarded as part of the actual value of such merchandise. * * *

This was followed in 1883 by an act which repealed certain previous sections and proceeded:

* * * And hereafter none of the charges imposed by said sections or any other provisions of existing law shall be estimated in ascertaining the value of goods to be imported, nor shall the value of the usual and necessary sacks, crates, boxes, or covering of any kind be estimated as part of their value in determining the amount of duties for which they are liable. * * *

It was said by the court:

This repeals the provisions of section 2907 that, in determining the dutiable value of the merchandise, there shall be added to its appraised market value (to be ascertained under section 2906, which is left unrepealed), the expenses and charges mentioned in section 2907, among which are "the value of the sack, box, or covering of any kind." * * *

The items thus specified in section 2907 of the Revised Statutes, and in section 14 of the act of 1874, being charges, and being eliminated as part of the dutiable value of goods, and section 2906 remaining for the appraisement of the goods *per se*, without the addition of any of the charges so abolished, it would seem that the meaning of section 7 of the act of 1883 was plain.

But that section goes on to say: "And hereafter none of the charges imposed by said sections or any other provisions of existing law shall be estimated in ascertaining the value of goods to be imported." Nothing is imposed by section 2907 of the Revised Statutes but the addition to the appraised market value, provided for by section 2906, of the items specified in section 2907, all of which are thus declared by section 7 of the act of 1883 to have been "charges." Those charges are no longer to be added or estimated, as before, in determining the dutiable value of the goods. So, the repealed section 14 of the act of 1867 imposed nothing except in respect of the items it specified, which were items to be added to appraised market value, and are, therefore, declared by section 7 of the act of 1883 to have been "charges."

The court thereupon determined that in view of this legislation it was not competent for the assessor to include as a part of the appraised value the value of the cartons and cases, a conclusion which is irresistible in view of the legislation. But it will be observed that stress was laid in this case upon the fact that the repeal of the act of 1883 had referred to these items specifically as charges to differentiate them from appraised value. Perhaps the case may be said also to be an authority for the proposition that under the state of the law as it then existed the appraisal was to be limited to the *per se* value of the goods.

The case of *Beard v. Porter* was a case in which the language used was dictum and the case arose under the same statutes considered in *Oberteuffer v. Robertson*.

United States v. Passavant arose under the customs administrative act of June 10, 1890. It was held in that case that—

Under section 7 the collector is to determine for himself the question of what is the *invoice* value of the goods, and in doing this he may add such charges as he considers to be dutiable, but his decision in this respect is not in the nature of an appraisement and may be attacked by protest. And while the general rule is that the valuation is conclusive upon all parties, nevertheless the appraisement is subject to be impeached where the appraiser or collector has proceeded on a wrong principle contrary to law or has transcended the powers conferred by statute.

This ruling was followed by this court in *Stein v. United States* (1 Ct. Cust. Appls., 36; T. D. 31007) and 1 Ct. Cust. Appls., 478 (T. D. 31525) and was reaffirmed in *United States v. Bauer* (3 Ct. Cust. Appls., 343; T. D. 32627).

It was held in the *Passavant* case that—

Whether the dutiable value in this case was erroneously increased by the unauthorized addition of an independent item to the market value, as asserted by the importers, was a question of law and properly carried to the Board of General Appraisers by protest and appeal.

The case does not, as I read it, support the contention of the Government.

The case of *United States v. Klingenberg* (153 U. S., 93) presented no such question as that here involved. At page 102 of the case the question therein involved was distinctly stated as follows:

The action of the collector in the present case did not relate either to the classification of the goods or to the rate of duty imposed thereon, but, as conceded by counsel for the appellee, merely increased the amount of duties to be paid by the importer

to the extent of the difference between \$0.32 as the value of the silver florin and \$0.482 as the value of the gold florin in the currency of account of the United States. This involved no dispute between the parties as to either classification or rate of duty or the dutiable value of the imported merchandise. But it did involve the proper construction of the law, as embodied in section 52 of the tariff act of 1890, and the estimate of the florin as made by the Director of the Mint and as proclaimed by the Secretary of the Treasury on July 1, 1892, made in pursuance thereof.

Whatever was said, therefore, in this case in discussing the various sections of the tariff act of 1890 must be regarded as dictum. On page 101 it was said:

Section 14 provides that the decision of the collector as to the "rate and amount of duties, * * * including all dutiable costs and charges, and as to all fees and exactions of whatever character, except duties on tonnage, shall be final and conclusive," unless the importer appeals to the Board of General Appraisers. This section clearly allows and provides for an appeal by the importer from the decision of the collector as to both rate and amount of duties, as well as dutiable costs and charges, and as to all fees and exactions.

As before stated, this is in no way essential to a decision of the case and occurs in the course of the process of stating the various sections of the act. As I have pointed out, the more obvious construction of this paragraph is that which accords to the language—"the decision of the collector as to the rate and amount of duties chargeable upon imported merchandise, including all dutiable costs and charges," the meaning clearly imported, *i. e.*, that the decision shall relate to the *amount* of duties which are chargeable upon the imported merchandise, which merchandise includes all dutiable costs and charges. Two things are left to the decision of the collector in this paragraph: One is the rate of duties. The other is the amount of duties, and in ascertaining the amount of duties confessedly the rate must be spread upon not only the merchandise *per se*, but all dutiable costs and charges named in paragraph 18. If this be not so, this court certainly was in error in *United States v. Francklyn* (4 Ct. Cust. Appls., 54; T. D. 33306), and the various decisions there cited were also in gross error.

The question here involved was ably discussed by Judge Waite in the case *In re Claffin*, G. A. 6082 (T. D. 26514), in which the distinction between the act of 1890, corresponding in the main features with the existing statute, and those under review in the cases cited was considered.

In the matter of *Newman & Co.* (T. D. 14929), in construing section 19 of the act of July 10, 1890, in which case cloths were dutiable according to their value by the square yard, the board said:

In determining the value of merchandise subject to an *ad valorem* duty, section 19 aforesaid requires the appraiser to include the amount of all costs and charges as therein specified.

In the matter of the *Supphee Hardware Co.* (T. D. 16806) the board had under consideration paragraph 138 of the act of 1894, which provided a sliding scale of duties on penknives and pocketknives, de-

pendent upon the value per dozen. The merchandise in question consisted of pocketknives invoiced at less than 50 cents per dozen, but with the value of the cases added and proportionately distributed, made the cost and appraised value of the invoice to exceed 50 cents per dozen. The goods were accordingly returned by the appraiser as pocketknives valued at more than 50 cents per dozen, including the proportionate value of the cartons and cases, which was distributed pro rata as part of the market value of the merchandise. The board held:

In making appraisements under this section, the value of the cases or other coverings is as much a part of the market value of the imported merchandise as the *per se* value itself of such merchandise. And this is so for all tariff purposes involving the assessment of duties, except when a different rule is specially provided in particular instances.

These cases were cited with approval and the rule of the cases followed by this court in *United States v. Francklyn*, *supra*. Note opinion of Judge Somerville (T. D. 32378).

So that it has been determined by this court that in the performance of the duty imposed upon the appraiser under subsection 10 to appraise the market value or wholesale price of merchandise at the time of exportation to the United States in the principal markets of the country whence the same has been imported, and the number of yards, parcels, or quantity, the appraiser is required to include the value of cartons, cases, etc., as part of the market value.

I think the decision in this case should be *affirmed*

UNITED STATES *v.* KLIPSTEIN & Co. (No. 1117).¹

GREASE, NOT SPECIFICALLY PROVIDED FOR.

The legal effect of paragraph 580, tariff act of 1909, is to cast upon importers the burden of establishing not only that the oil imported is fit for the uses therein enumerated, but that it has no practical commercial fitness for other uses than those named. *Stone & Downer Co. v. United States* (4 Ct. Cust. Appls. 47; T. D. 33266). There is here a clear preponderance of proof of the Government's contention that the grease of the importation was not so limited in its use.

United States Court of Customs Appeals, December 15, 1913.

APPEAL from Board of United States General Appraisers, Abstract 29103 (T. D. 32681).
Abstract 31415 (T. D. 33217).

[Reversed.]

William L. Wemple, Assistant Attorney General (*Charles D. Lawrence*, assistant attorney, on the brief), for the United States.

Brown & Gerry for appellees.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

The importation in question in this case was returned for duty by the appraiser as grease, not specifically provided for, at 25 per cent

¹ Reported in T. D. 34003 (25 Treas. Dec., 684).

ad valorem. It was claimed by the importer to be free from duty under paragraph 580 of the tariff act of 1909, under the provision for—

Grease, fats, vegetable tallow, and oils * * * such as are commonly used in soap making or in wire drawing, or for stuffing or dressing leather, and which are fit only for such uses, and not specially provided for.

The question presented on this appeal is whether the presumption arising from the action of the appraiser and collector in listing this importation as subject to duty under paragraph 3 has been overcome by the testimony offered on behalf of the importer not disproved by that of the Government.

In *Stone & Downer Co. v. United States* (4 Ct. Cust. Appls., 47; T. D. 33266) it was held that the legal effect of the provisions of paragraph 580 is to cast upon the importers the burden of establishing not only that the oil imported is fit for the uses therein enumerated, but that it has no practical commercial fitness for other uses than those named. The importers assumed this burden in the present case and called three witnesses. The first was John H. Yocum, who was a chemist by profession, but also engaged in the leather business. His testimony was to the effect that grease of the character of that here involved was used for stuffing and dressing leather. He was asked:

Q. Please state for what purpose you have used it and seen it used.—A. I have used it for the purpose of mixing in the grease used for stuffing harness leather, belting leather, upper leather, and shoe leather.

Q. Is that the only use, that of mixing with other greases for stuffing leather, that you have known the article to be applied to?—A. That is all I have known it to be applied to.

Q. Now, basing your answer upon your quantitative and qualitative analyses and upon your practical and chemical experience, please state whether you know of any other uses to which the merchandise could be put than that to which you have testified.—A. I don't know of any purpose to which it could be—of any use to which it can be put successfully.

Q. I mean practically, as a business proposition.—A. Yes, successfully; yes.

He further testified in answer to the question, "And your experiments have been conducted for determining any other possible practical use, whether there are any other practical uses?" by saying:

Well, I can't say that I have carried on experiments to determine whether it can be used in other industries. All I can say is that so far as I know it is not used. You could not use it in the candle industry, because the high percentage of fatty acids present which would occasion—which do occasion as a matter of fact—very acrid odors, would prevent its use there. You can not use it for stiffening tallows on account of the high free fatty acids when they sell tallow on a minimum of free fatty acids.

He also expressed the opinion that it could not be used for dressing wools or for soap making on account of its smell.

Another witness called for the importer was Charles L. Burton, who testified that he was a commission merchant in greases and oils; that he was familiar with the article and had personally bought and

sold it, and had been familiar with it for six or seven years, and that the uses to which it is put are for leather stuffing; that he had sold it for that purpose; that he knew of no other use. In answer to the question, "So that you don't know actually whether they use it for stuffing leather or oiling machinery?" he replied: "Unless by common repute."

The importers also produced one E. Deutz, who testified that he was connected with the importers and engaged in selling articles corresponding to those imported in the present case and had been for five or six years, and when asked if he knew the uses to which it had been put during that period replied that he knew of one use.

Q. Only one use?—A. Yes, sir.

Q. Is there only one use you know of?—A. Yes, sir.

Q. What is that use?—A. Stuffing leather.

On cross-examination he was asked:

Q. Have you ever sold any of this merchandise to manufacturers of rouges or polishing powders?—A. No, sir.

Q. Do you have any dealings with people of that class anyway?—A. Yes, we have.

Q. Do you sell them a grease for that purpose?—A. No, sir.

Q. Have you ever tried to sell this so-called stearin to rouge manufacturers?—A. No, sir.

The Government then took the case and offered testimony of witnesses which tended to show that such greases as those here involved had been sold for manufacturing rouges for jeweler's use, one witness testifying that he had been receiving continuous orders from jewelry houses for two years or more for such merchandise, and that it also was sold to leather-belt manufacturers, and was further sold to manufacturers of Putz pomade, which is used for cleaning; that his sale to jewelry supply houses amounted to two or five cases at a time, and that in the course of five years he had imported in all about 100 cases; that pretty nearly all of this, with the exception of two cases sold to Putz pomade people, had been sold to the jewelry supply houses for the purpose indicated. The Government also produced E. Reid Burns, who testified that he used material similar to that involved in preparing polishing supplies; that the material looks exactly like it, smells like it, has the same color and the same consistency, and is, in his judgment, unquestionably adapted to the same uses. And in answer to questions by importers' counsel as to whether he would buy a lot like the exhibit in question without further examination, he replied that he would, and buy on the strength of what he had seen in the samples, and that he was quite sure it would be useful to him for making polishing paste; that he had used varying quantities, beginning in 1900 with 1,300 to 1,400 pounds a year, and in 1911 about 1 ton; and that he was using some at the time his testimony was given.

The Government also called Thomas Newsome, who was a dealer in dyestuffs, chemicals, and oils, residing in Boston. He testified that he had had 20 years' experience in dealing in this line of goods; that he was familiar with wool-grease stearin; that he used it himself in his own works for a water resist on animal or vegetable fibers to give a fiber a power to resist water; that he had also used it for giving a water resist for mineral fibers, such as asbestos; that he had sold it for softening size for sizing cottons; and that these uses were substantial. He also testified that it was used for stuffing leather and was largely used for that purpose. He did not know the extent. He had also seen it used and had used it in his own mills and factories as a belt grease; that is, to keep the belt biting on the pulley; that when used as a water resist it was used in connection with other materials, but when used for a belt grease it was used in the form in which imported.

The Government also produced Herbert Gardner McKerrow, who testified that such material as is here involved had been used for stuffing leather and for belt dressing; that it was also used as a base for brass polish; that these uses were within his observation and knowledge; that it was also used for thickening oils quite extensively; that he had sold it for all these purposes; and that the article has substantial uses along those lines, within his knowledge; that he had sold it to a man who used it extensively for metal polish. He also stated in answer to the question:

Are you prepared to say whether in the adulteration of tallow or thickening of oils, or in belt dressing, or in the use in the manufacture of metal polishes the article is used in the condition in which it appears here before us or whether it is mixed or has a process applied to it to fit it for the ultimate uses which you have described?—
A. I should say in the majority of cases it is mixed. I understand it is also mixed for softening leather.

The statement that the goods are mixed with other ingredients to use for stuffing leather agrees with the testimony of importers' witness Yocum. There was no direct contradiction of the testimony of the Government's witnesses that the grease in question is used for metal polish, for instance, and for belt grease, and by jewelers in the manufacture of rouge. The Government's testimony tends to show that the grease in question is used for these purposes and that the uses are substantial. We think this testimony was sufficient to overcome the testimony offered by the importers. It is true the testimony of the importers was sufficient to make a *prima facie* case, but the negative testimony which they offered was met by affirmative testimony showing specific uses, and importers rested their case without meeting by further testimony this affirmative convincing proof.

We feel constrained, therefore, to hold that the very clear preponderance of proof in this case is with the Government and that as to the points covered it is not controverted by any persuasive testimony.

The decision of the board is *reversed*.

HUNTER & Co. *et al.* v. UNITED STATES (No. 1150).¹

MAGGI'S SOUPS IN TABLETS—VEGETABLES, PREPARED.

The fact that these tablets are vegetables prepared for soup does not take them out of the category of "vegetables, prepared," paragraph 252, tariff act of 1909. The evidence is insufficient to overcome the presumption that the collector's decision was correct.

United States Court of Customs Appeals, December 15, 1913.

APPEAL from Board of United States General Appraisers, Abstract 31611 (T. D. 33263),
Abstract 31850 (T. D. 33304).

[Affirmed.]

Brown & Gerry for appellants.

William L. Wemple, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, of counsel; *William A. Robertson*, special attorney, on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DeVRIES, and MARTIN, Judges.

SMITH, Judge, delivered the opinion of the court:

Two importations of merchandise invoiced as "Maggi's soups in tablets" were classified by the collector of customs at the port of New York as prepared vegetables and were accordingly assessed for duty at 40 per cent ad valorem under the provisions of paragraph 252 of the tariff act of 1909, which said paragraph reads as follows:

252 Vegetables, if cut, sliced, or otherwise reduced in size, or if parched or roasted, or if pickled, or packed in salt, brine, oil, or prepared in any way; any of the foregoing not specially provided for in this section, and bean stick or bean cake, miso, and similar products, forty per centum ad valorem.

As to one of the importations the importers protested that the article was not a mere vegetable as classified, but a nonenumerated manufactured article, dutiable at 20 per cent ad valorem under paragraph 480, in accordance with Abstract 26680 (T. D. 31883).

As to the other importation the importers protested that the goods were dutiable under other paragraphs of the law and at lesser rates than the paragraph under which they had been assessed. The real ground of protest, however, upon which the importers relied in both cases, was the claim that the merchandise was a nonenumerated man-

¹ Reported in T. D. 34004 (25 Treas. Dec., 688).

ufactured article, dutiable at 20 per cent ad valorem under the provisions of paragraph 480, which paragraph, in part, reads as follows:

480. That there shall be levied, collected, and paid * * * on all articles manufactured, in whole or in part, not provided for in this section, a duty of twenty per centum ad valorem.

The Board of General Appraisers overruled the protests and the importers appealed.

The collector classified the merchandise as prepared vegetables. From the evidence adduced by the importers at the hearing before the board it appeared that the tablets are "vegetables prepared for soup," but as to how the goods are made up, or whether meat, bacon, or anything other than vegetables enters into their composition is not disclosed by the record. The fact that the tablets are vegetables prepared for soup does not take them out of the category of "vegetables, prepared." *Nix v. Hedden* (149 U. S., 304, 307).

On the case as it stands we can not say that the presumption of correctness attaching to the collector's decision has been overcome, and much less can we say that the goods are dutiable under any of the paragraphs claimed by the importers in their protests.

The decision of the Board of General Appraisers is *affirmed*.

UHLFELDER Co. *et al.* v. UNITED STATES (No. 1166).¹

1. "LEAF."

Gold leaf or silver leaf is a very thin piece or sheet of metal which has been reduced to that condition by beating or hammering.

2. THIN SHEETS OF DUTCH METAL IN BOOK FORM.

The leaves of metal in paragraph 175, tariff act of 1909, are such leaves only as singly result from the hammering of the beater and that may be trimmed to dimensions but not united together. The present articles are combinations of leaves, and they were rightly counted as such.

United States Court of Customs Appeals, December 15, 1913.

APPEAL from Board of United States General Appraisers, G. A. 7446 (T. D. 33276).

[Affirmed.]

Comstock & Washburn (George J. Puckhafer, of counsel) for appellants.

William L. Wemple, Assistant Attorney General (*Martin T. Baldwin*, special attorney, of counsel), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MARTIN, Judge, delivered the opinion of the court:

The merchandise involved in this case consists of excessively thin sheets of Dutch metal or of aluminum put up in books.

¹ Reported in T. D. 34005 (25 Treas. Dec., 689).

The collector assessed the same with duty under the following provision of paragraph 175 of the tariff act of 1909:

175. * * * Bronze, or Dutch metal or aluminum, in leaf, six cents per one hundred leaves.

It is conceded by the importers that the merchandise bears the foregoing classification, and the only issue in the case relates to the proper method of computing the leaves for assessment.

The appraiser reported that each book contained 25 double leaves. Accordingly every such book was counted for assessment at 50 leaves, upon the holding that each double leaf consisted of two leaves united, within the intent of the provision. The importers duly protested, claiming that each so-called double leaf was actually and legally a single leaf and should be so assessed. The protest was heard upon evidence by the Board of General Appraisers and was overruled. The importers now appeal from that decision.

The size of the sheets in question is $5\frac{1}{2}$ by $11\frac{1}{4}$ inches each. The Government chemist reported that each piece is composed of two or more pieces joined together, and that the pieces are coated with a small amount of substances soluble in part in alcohol and in water, respectively. The same chemist, when called as a witness by the Government, testified as follows:

Q. Did you make a close examination of the samples?—A. Yes, sir.

Q. Please tell the board what you found?—A. I found each piece to consist of two or more pieces joined together.

Q. In what manner joined together?—A. Joined together probably by rolling or pressure.

Q. Did you find anything else on the samples?—A. Yes, sir; one side contains a little substance soluble in alcohol of resinous character; the other side contains some little substance, something adhesive soluble in water.

This testimony is undisputed.

It appears from the evidence that the first process in the manufacture of the present article is the beating or hammering of a small piece of metal into a single thin sheet, which is generally trimmed into a square form. Thereupon a number of these single sheets, in the present case two, are joined together, end to end, into a larger sheet by means of pressure possibly aided by the solution above referred to. This united sheet is the article now at bar.

The sole inquiry in the case is whether or not the united sheet thus described shall be counted at assessment as one sheet or as two. The following quotations will aid in this inquiry:

Oxford Dictionary:

Dutch. * * * 3. b. * * * Dutch foil, gold, gilt, gilding, leaf, metal, a very malleable alloy of 11 parts of copper and 2 of zinc beaten into thin leaves, and used as a cheap imitation of gold leaf.

* * * * *
Gold leaf. * * * A minute quantity of gold, beaten out into an extremely thin sheet, averaging from 3 to $3\frac{1}{4}$ inches square. * * *

Standard Dictionary:

Silver. * * * s. Leaf, very thin silver-foil. s.-Foil, silver beaten to a thin leaf.

International Encyclopaedia:

Gold beating. The process by which gold is hammered into thin leaves. * * *

Century Dictionary:

Leaf. * * * A very thin sheet of hammered metal; foil: as gold leaf.

See Encyclopaedia Britannica: Article, "Gold beating."

. It may be noted that in paragraphs 177 and 178 of the act of 1909 provision is made *eo nomine* for gold leaf and silver leaf also.

The foregoing authorities sustain the claim that the word "leaf," when conjoined with the names of the metals now in question, signifies a very thin piece or sheet of metal which has been reduced to that condition by beating or hammering. The word is an ancient one in the language; and the art itself is an ancient one in history. The authorities limit the application of the term to the single sheet which individually results from the beating or hammering process to which a piece of metal is subjected. Such individual sheets must necessarily be small in superficial dimensions; just what the limitations are in respect to Dutch metal or aluminum does not appear.

The term "leaf" was used in preceding tariff revisions in the same manner as in the act of 1909, and there is nothing in the evidence tending to withdraw it from the common dictionary meaning above given.

It appears, however, from the evidence that since the enactment of the tariff revision of 1909, or very shortly prior thereto, the importers first began to import the present united sheets, claiming assessment of them as single leaves under the foregoing provisions of the act. It is stated that such sheets are made in various sizes, of which 11½ by 13 inches is the standard size. As has been stated, the present importations are 5½ by 11½ inches in size. It seems certain that each of these sizes is quite in excess of the practicable size of single beaten leaves, and it is obvious that the united sheets could be increased almost indefinitely in dimensions. For example, a roll could be made, small in width but of great length, constituting a single continuous sheet. It appears in the testimony that such rolls are in fact produced by the manufacturer of the present article, which rolls are 100 yards each in length and are used for cigar tips. If such a piece is entitled to assessment as a single "leaf," then the duty of 6 cents per 100 leaves is practically abrogated.

Upon the foregoing facts and considerations the court reaches the conclusion that the leaves of metal named in paragraph 175 are intended to be such leaves only as singly result from the hammering of the beater, which leaves may be trimmed to dimensions, but not united together. No other limitation of size is suggested, nor is there authority for any other. Accordingly the present articles are

not themselves single leaves, but are combinations of leaves, and the collector was right in so counting them.

The decision of the board sustaining the assessment is *affirmed*.

AMERICAN GLUE CO. *v.* UNITED STATES (No. 1197).¹

1. EVIDENCE—ERROR.

The importer having made out a *prima facie* case that the goods received at his factory and used there were the goods imported, it was error to refuse to allow him to show the nature and character of the goods he did in fact receive and the use to which these were put.

2. SAMPLES—GLUE STOCK—FUR WASTE.

The issue in this case was fully presented—namely, was the importation glue stock or fur waste? And the record contains nothing to show satisfactorily that the samples employed for assessment purposes were true samples, but, rather, the contrary.

United States Court of Customs Appeals, December 15, 1913.

APPEAL from Board of United States General Appraisers, Abstract 32266 (T. D. 33409).

[Reversed.]

Walter Evans Hampton for appellant.

William L. Wemple, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, of counsel), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

SMITH, Judge, delivered the opinion of the court:

One hundred and twenty-five bales of merchandise imported at the port of New York were classified by the collector of customs as "fur waste" not specially provided for and assessed for duty at 10 per cent *ad valorem* under the provisions of paragraph 479 of the tariff act of 1909, which paragraph reads as follows:

479. Waste, not specially provided for in this section, ten per centum *ad valorem*.

The importers objected to the classification of the goods and the assessment of duty thereon by the collector, and in their protest set up among other grounds of objection the claim that the merchandise was glue stock, entitled to admission free of duty under the provisions of paragraph 584 of the free list, which reads as follows:

584. Hide cuttings, raw, with or without hair, and all other glue stock.

The Board of General Appraisers overruled the protest and this appeal resulted.

From the uncontradicted testimony in the record it appears that 47 bales of merchandise marked "H" and 78 bales of merchandise marked "K," invoiced by J. Hüchel's Söhne, of Neutitschein, Austria, to the American Glue Co., as glue stock were brought into the port of New York by the steamship *President Lincoln* on August 11, 1909.

¹ Reported in T. D. 34006 (25 Treas. Dec., 692).

On the same date and by the same vessel there arrived in the port of New York 27 bales of merchandise marked "H" and 29 bales of merchandise marked "K," which were invoiced by J. Hückel's Söhne to Julius Kruchten as animal hair.

On August 14 the goods consigned to Kruchten were entered and a permit was issued by the deputy collector to land and deliver the same, reserving out bale 28 of the mark K and bale 3 of the mark H to be sent to the appraiser's stores for examination.

The goods imported by Kruchten were small pieces of rabbit skin with the fur on, which were returned as "raw rabbit snips," dutiable as fur waste. Customs Examiner Hare, who examined the merchandise covered by the Kruchten invoice, testified on the hearing before the board that the "snips" were similar to the sample retained by the customs officers as the official sample taken from the importation made by the American Glue Co.

The examiner made no personal examination of any of the bales of merchandise invoiced as glue stock, but determined the character of that importation from a sample submitted to him by Sampler Smith and purporting to have been taken from two of the bales imported by the American Glue Co. No particular precautions seem to have been taken against mistaking one H. K. importation for the other, and consequently whether the sample on which the classification of the goods was made was actually taken by Smith from the H. K. consignment of the American Glue Co. rather than from the H. K. consignment of J. Kruchten is left open to serious question. In his testimony before the board Smith stated that he recollected a lot of some 125 bales of glue stock which arrived in August, 1909, and were discharged from the *President Lincoln* at Pier 3, Hoboken, port of New York, on a permit by virtue of which he was to take samples for examination from two bales of the goods. In this connection it should be noted that the permit for the landing of the American Glue Co.'s goods did not call for the examination of two bales, but that the permit issued to Kruchten did specify for examination bale 3 of mark H and bale 28 of mark K. Smith further stated that he found but one lot of goods marked "H. K.," and that he sampled the only lot of H. K. which came to his attention, but that he did not notice whether any of the lot was consigned to the American Glue Co. According to Smith's testimony he did not observe the numbers of the bales on the lot of H. K. which came to his attention, but took at random, so to speak, one sample from a bale marked "H," and another from a bale marked "K," which samples were not preserved as separate samples, but were put together as a single sample. Smith says that on the day on which the samples were taken by him he was the only sampler on the dock on that ship and that the official sample represents the samples which he took. From this testimony it is apparent that Smith considered

that there was but one lot of goods marked "H. K.", and that taking no note of the numbers on the bales, he was just as likely to have taken a sample from the importation made by Kruchten as from that made by the American Glue Co., if both importations were on the dock at the same time.

The importing company contended before the board and contends on this appeal that the sample on which this importation was classified was not taken from the importation and that as a matter of fact the 125 bales of merchandise delivered to it under the permit from the customhouse was glue stock and not the "raw rabbit snips" represented by the official sample. In support of this contention William J. Glacken testified on behalf of the importer that 125 bales of glue stock consigned to the American Glue Co. were brought to New York by the steamship *President Lincoln*; that 47 of these bales were marked "H" and numbered from 1 to 47, and that 78 of them were marked "K" and numbered from 1 to 78. Glacken says he was charged with the shipment of this merchandise, and that he shipped it by the Pennsylvania Railroad to the American Glue Co. at Springdale, Pa., in a New York, New Haven & Hartford car numbered 71040. C. T. Sharpless, another witness for the importers, stated that he was superintendent of the Springdale factory of the American Glue Co., and that that company was engaged in the business of manufacturing glue. He testified that on August 23, 1909, 125 bales of glue stock arrived at Springdale in a New York, New Haven & Hartford car numbered 71040; that he examined the bales at the time of arrival at Springdale; and that the official sample submitted to him at the hearing did not represent that carload of merchandise.

So far as we can find, there is nothing in the record except the collector's decision which would justify the conclusion that the sample on which the assessment in this case was made was taken from the importation of the American Glue Co. and not taken from the goods invoiced to Julius Kruchten. It is true that the claim that the sample was taken from the importation is sustained by the presumption of correctness attaching to that decision, but that presumption is overcome, we think, by the clear preponderance of evidence offered by the importers and received by the board at the hearing. The record of the cargo of the *President Lincoln* shows but one consignment to the American Glue Co. and but one importation by that company of merchandise, 47 bales of which were marked "H," numbered 1 to 47, and 78 bales of which were marked "K," and numbered 1 to 78. The testimony is uncontradicted that 125 bales of merchandise brought to New York by the *President Lincoln*, consigned to the American Glue Co., and marked and numbered H, 1 to 47, and K, 1 to 78, were shipped to the company's factory at Springdale over the Pennsylvania lines in a car of the New York, New

Haven & Hartford Railroad numbered 71040. It is also uncontradicted that 12 days after the arrival of the *President Lincoln* 125 bales of merchandise, marked "H" and "K," arrived at the Springdale factory of the American Glue Co. in a New York, New Haven & Hartford car numbered 71040, and that that merchandise was glue stock, and was neither rabbit snips nor merchandise of the character or kind represented by the official sample.

In our opinion these facts proved by the importer established at least *prima facie* that the sample of the goods upon which the collector based his assessment was not taken from the importation. No sample of the goods which came to Springdale was preserved, but the importer offered to prove by Sharpless their nature and kind and that they were fairly and accurately represented by an illustrative sample which was offered in evidence. The board declined to admit the testimony and refused to accept the illustrative sample as representative of the goods actually received at Springdale, to which ruling the importers excepted. The importers having proved, at least *prima facie*, that the goods which arrived at Springdale in car No. 71040 of the New York, New Haven & Hartford Railroad were the same goods which had been imported for it on the *President Lincoln* and assessed by the collector as fur waste, should have been permitted to show the nature and character of the goods which were actually received at Springdale, and the board erred in refusing to allow them to make such proof.

King Upton, vice president of the American Glue Co., testified that the company made glue out of the 125 bales of merchandise which came on the *President Lincoln*, and that the official sample was not only not glue stock, but that glue could not be made out of it. To this testimony on the part of Upton that the official sample was not glue stock and that glue could not be made out of it the Government objected, which objection was sustained, and the importer excepted. It having been established *prima facie* that the consignment received at Springdale from the *President Lincoln* was glue stock and that the importer made glue out of it, it was entirely proper to show that the official sample was not glue stock and that glue could not be made out of that kind of goods.

On a review of the entire record we are satisfied that the interests of justice will be best subserved by permitting the importing company to prove the true nature and character of the goods shipped to it on the *President Lincoln* by J. Hüchel's Söhne and actually received by it at Springdale in New York, New Haven & Hartford car No. 71040.

Whether the importation was glue stock or fur waste was the issue in this case, and that issue was fully presented by the protest.

The decision of the Board of General Appraisers is reversed, and the case remanded for a new trial.

MANISCALCO v. UNITED STATES (No. 1228).¹**EVIDENCE—IMPERFECT RECORD.**

The record as to findings is so lacking in essentials that, without prejudice, the cause is remanded for a new trial.

United States Court of Customs Appeals, December 17, 1913.

APPEAL from Board of United States General Appraisers, Abstract 33302 (T. D. 33677).
[Remanded.]

Brown & Gerry for appellant.

William L. Wemple, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, of counsel; *William A. Robertson*, special attorney, on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

PER CURIAM: In this case it was necessary for the Board of General Appraisers to find the date when the merchandise was landed and, on appeal, to return here the evidence relevant thereto. Such a finding is not of record and there is no satisfactory evidence returned from which the same can be determined.

The board found that the appraiser's report of "no damage" was made April 27, 1911, and not within 10 days after the date of landing, the period prescribed by the statute therefor. No evidence appears to be in the record or files upon which this finding is based.

We conclude that the requisite proof upon which these facts may be found can be presented to the board at another hearing of the case.

To the end that the findings necessary to the proper determination of this case may be made, and, if appeal is taken, that the same and the evidence upon which such findings are based may be returned to this court, the judgment of the Board of General Appraisers is *reversed*, without prejudice to either party, the case remanded, and a new trial ordered.

SMITH & CO. v. UNITED STATES (No. 1229).²**SALTED OR SMOKED HERRINGS IN OIL IN TINS.**

The broad language of paragraph 270, tariff act of 1909, fixing duty on fish (except shellfish), by whatever name known, packed in oil, makes the legislative intent clear to include all fish so processed, including herrings. The word "herrings" is not there used, but herrings are included within its terms just as definitely and exactly as if the word had been employed, for it includes fish conditioned as there described by whatever name known.—*United States v. Smith & Nessel Co.* (4 Ct. Cust. Appl., 70; T. D. 33312) distinguished.

United States Court of Customs Appeals, December 15, 1913.

APPEAL from Board of United States General Appraisers, G. A. 7474 (T. D. 33588).
[Affirmed.]

B. A. Levett for appellants.

William L. Wemple, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

The protest in this case was submitted on stipulation, from which it appears that the merchandise in question consisted of salted or

¹ Reported in T. D. 34007 (25 Treas. Dec., 696).

² Reported in T. D. 34008 (25 Treas. Dec., 697).

smoked herrings in oil in tins of a capacity between $7\frac{1}{2}$ and 21 cubic inches, the contents of each tin weighing 5 ounces. It was assessed for duty at $2\frac{1}{2}$ cents per can under the clause in paragraph 270 for—

Fish (except shellfish) by whatever name known, packed in oil, in bottles, jars, kegs, tin boxes or cans * * * in packages containing more than $7\frac{1}{2}$ and not more than 21 cubic inches.

It was claimed to be dutiable under paragraph 272 as salted herrings. The board sustained the action of the collector and the importers bring the case here for review.

We have considered the subject of herrings in numerous cases, beginning with *United States v. Rosenstein* (1 Ct. Cust. Appls., 304; T. D. 31357) and including *Ahlbrecht & Son v. United States* (2 Ct. Cust. Appls., 471; T. D. 32226), the recent cases of *United States v. Smith* (4 Ct. Cust. Appls., 70; T. D. 33312) and *United States v. Haaker* (4 Ct. Cust. Appls., 471; T. D. 33884).

The first of these cases held that herrings, kippered, were, in view of the evidence showing that herrings so processed could only be introduced into the commerce of the country in tin cans, more specific than the provision for fish in tins. The Ahlbrecht case extended this view to smoked herrings and other herrings even though they could be introduced otherwise than in tins, adopting the view that all herrings, being correlated in the same paragraph, were more specifically provided for therein than by the general provision for fish in tins. The case of *United States v. Smith*, *supra*, and *United States v. Haaker*, *supra*, followed the rule in the Ahlbrecht case. But none of the cases presented the question appearing on the present record, for the particular clause in paragraph 270 here involved was not involved in any of them. In the case last cited, the provision in general terms of paragraph 273 for "fish, skinned or boned," was contrasted with "herrings, pickled or salted, smoked, or kippered." It was said in the opinion by Judge Smith:

The decision of the case therefore really involves nothing more than the determination of whether the importation is more specifically designated as "herring, pickled," or as "fish, skinned or boned."

It was determined that "herring, pickled" was more specific. But it was said:

Were the competing provisions "herring, pickled," and "herring, skinned or boned," it is entirely probable that the latter might be regarded as the narrower designation, considering that the former embraces not only herring, skinned and boned, but also those which are not. Here, however, the competition is not between "herring, pickled," and "herring, skinned or boned," but between "herring, pickled," and a broad provision which comprehends not only herring, but all fish skinned or boned and whether pickled or not.

In the present case, however, the competing provision of paragraph 270 is not less but more specific than that of paragraph 272 *as applied to the subject matter in question*. It is true that herrings are not specifically named in paragraph 270, but it is possible to use

broad language to reach the most exact specificity. Comprehensiveness may so completely hedge about a term as to make clear the legislative intention to include a particular article, and this beyond all peradventure. An instance of this is shown in the provisions of paragraph 475 for all smokers' articles whatsoever, of which language it was said in *Knauth v. United States* (1 Ct. Cust. Appls., 334, at page 336):

The intensified form of the expression used, together with the far-reaching effect of the qualifying words stated, manifests to our mind a purpose on the part of the legislature to reach out into all branches of trade and commerce and to gather within the dutiable provisions of this paragraph everything used chiefly by smokers, in that pursuit and for that purpose, wherever else they may occur or within whatever other provisions of the tariff law the merchandise may be included.

And accordingly it has been held that these words prevail over the words "boxes, made wholly or in chief value of leather," when both are applicable. *Mark Cross Co. v. United States* (1 Ct. Cust. Appls., 377; T. D. 31434); *Dale v. United States* (2 Ct. Cust. Appls, 384; T. D. 32111).

Now, in the present case we find language quite as comprehensive and it leaves no room for construction. "Fish, * * * *by whatever name known*, packed in oil, in bottles, jars, kegs, tin boxes or cans" is a phrase not difficult of comprehension or of application. When we find fish packed in oil in a tin can, there is no difficulty whatever in saying that it is described by the words quoted. When it is said that the present importation is herrings, and that the phrase does not employ that name, the answer is that while it does not employ the word "herrings," it does include herrings within its terms just as definitely and absolutely as if the word had been employed one or more times, for it includes fish, so conditioned, *by whatever name known*.

For a case construing the phrase "by whatever name known," see *Mason v. Robertson* (139 U. S., 624, 627).

It is claimed that the *Smith* case (T. D. 33312) is conclusive. It is said that it is immaterial whether the fish be packed in oil, as in this case, or in tomato sauce, as in that case. But we think this is in error. In the *Smith* case the presence of tomato sauce did not bring the fish within any paragraph fixing a different tariff status for fish packed in or flavored with that material. Nor did the presence of tomato sauce tend in any way to make the classification as "fish in tins" the more appropriate. But in this case the fact that these fish are *packed in oil fixes their tariff status*, and when we find that the packing in oil does so fix the tariff status, we are not prepared to hold that herrings which are salted, and hence in that state dutiable under paragraph 272, can be further processed by being packed in oil and escape classification under paragraph 270 because it had *once* been in a state which entitled it to a classification as herrings, salted.

The decision of the board is *affirmed*.

BOYE NEEDLE CO. v. UNITED STATES (No. 1234)¹

COILED SPRING WIRE ARTICLES.

The coiling process to which this wire has been subjected has given the wire a new character, name, and use. It is not according to the accepted definition of "wire," "a slender rod, strand, or thread of ductile metal," but is essentially different from this. It has a use as a spring, resulting from the changed form into which the original wire has been permanently converted. It was dutiable as an article manufactured of wire.

United States Court of Customs Appeals, December 15, 1913.

APPEAL from Board of United States General Appraisers, Abstract 32898 (T. D. 33591).

[Affirmed.]

Comstock & Washburn (George J. Puckhafer, of counsel) for appellants.

William L. Wemple, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, of counsel; *Martin T. Baldwin*, special attorney, on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DeVRIES, and MARTIN, Judges.

MARTIN, Judge, delivered the opinion of the court:

The merchandise consists of coiled round steel wire smaller than No. 16 wire gauge. The importation was assessed with duty under the classification of "articles manufactured * * * of wire," within the provisions of paragraph 135 of the tariff act of 1909.

The importers protested, claiming the merchandise to be simply wire and not articles manufactured of wire.

The protest was submitted upon evidence to the Board of General Appraisers and was overruled, from which decision the importers now appeal.

A sample of the merchandise is before the court and the testimony explains its origin and uses. The article is made by running lengths of straight wire into a coiling machine. This machine is composed in part of a long cylinder with attachments, by means of which the wire is closely and permanently coiled into flexible and springlike tubes of wire. These are imported in lengths of 50 to 150 feet, which are afterwards cut into lengths of 28, 42, and 52 inches. These pieces are plated with copper and nickel and brightened by friction in a so-called tumbling machine; their ends are then trimmed and fitted with attachments whereby they are finished for use as sash curtain rods.

The importation in question consists of the continuous lengths of coiled wire first mentioned before these are cut into standard lengths for finishing as curtain rods.

The question therefore is whether for duty purposes the coiling of the wire, as above explained, converts it into "an article made of wire," or whether it remains nevertheless simply "wire." This question is answered by the fact that the straight lengths of metal rod which are fed into the coiling machine are themselves wire

¹ Reported in T. D. 34009 (25 Treas. Dec., 699).

within the tariff usage of that term; and if imported these lengths would be dutiable as "wire smaller than number 16 wire gauge" within the provisions of paragraph 135 of the act. The coiling process, however, gives to this wire a new and peculiar character, name, and use. The new article is not "a slender rod, strand, or thread of ductile metal," which is the accepted definition of the word "wire," but is an article permanently and essentially differing therefrom in form. Nor does the new article bear the name of "wire"; it is called coiled wire spring, or coiled wire with a hyphenated signification. The present importation is invoiced as "round coiled spring." The new article has a use as a spring which differs from that of simple wire, and results from the changed form into which the original wire has been permanently converted.

It thus appears that the present article is not simply improved wire, but rather is a new product into which wire enters as a material and emerges as a manufacture.

The decision of the board is therefore *affirmed*.

UNITED STATES *v.* PROCTOR CO. (No. 1120).¹

ENTRY WITHOUT AN ADDITION TO THE INVOICE PRICE.

These automobile tires were sold and imported to replace defective tires. The brokers made the entry, following the invoice, without adding anything to the invoice price to make market value. This was not a clerical error. Subsection 7 of section 28, tariff act of 1909, plainly requires, if it is desired to add to the invoice value to make market value, that this should be done at the time of making entry and not afterwards.—*United States v. Swedish Produce Co.* (4 Ct. Cust. Appls., 223; T. D. 33437; *United States v. Wyman*, 4 Ct. Cust. Appls., 264; T. D. 33485).

United States Court of Customs Appeals, January 14, 1914.

APPEAL from Board of United States General Appraisers, Abstract 31245 (T. D. 33160).

[Reversed.]

William L. Wemple, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, of counsel), for the United States.

Walter S. Penfield (*Tench T. Marye* of counsel) for appellee.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

The importers entered for duty three cases of motor tires at the port of Boston in September, 1911. They were entered at the value of 209 pounds 9 shillings. The appraiser added, to make market value, 66 pounds 7 shillings and 8 pence, and imposed additional duty under subsection 7 of section 28 of the tariff act of 1909. The entry value agreed with the invoice value. There was no appeal to reappraise-ment from the appraiser's action in adding to make market value,

¹ Reported in T. D. 34091 (26 Treas. Dec. 75).

but the importers appealed upon the ground that the mistake occurred through a clerical error. The facts tending to show the so-called clerical error are that the goods were entered for Mr. Bradley W. Palmer through the appellees as brokers. It appears that in 1910 Mr. Palmer bought certain tires from the manufacturers in England, which in use proved defective and unsatisfactory. By special agreement these tires were replaced by new tires at a reduced rate. The tires in question were furnished to Mr. Palmer at the price actually stated in the invoice, but in fixing this price the sellers were doubtless controlled by the considerations above stated. These facts were, of course, known to Mr. Palmer. The brokers made the entry without adding anything to the invoice price to make market value, and the question presented is whether this failure to make the addition is a clerical error.

The subsection referred to provides:

SEC. 7. That the owner, consignee, or agent of any imported merchandise may at the time when he shall make and verify his written entry of such merchandise but not afterwards, make such addition in the entry to or such deduction from the cost or value given in the invoice or pro forma invoice or statement in form of an invoice, which he shall produce with his entry, as in his opinion may raise or lower the same to the actual market value or wholesale price of such merchandise at the time of exportation to the United States, * * *.

The course pointed out in this provision was not followed; but it is claimed that inasmuch as there were available to the appraiser catalogues showing the value of such tires it was an obvious or manifest error committed by the brokers which the appraiser was bound to take notice of, and that under the provision of the same subsection that "such additional duties shall not be construed to be penal, and shall not be remitted nor payment thereof in any way avoided except in cases arising from a manifest clerical error," these facts bring the case within the provision for manifest clerical error and authorize a refunding of the excess duties paid under protest.

We think, in any view that can be taken of this case, that the position urged must be held untenable. There is no doubt on the record that the entry was made in the precise terms intended and that the intent and purpose of the brokers was to follow the invoice in making the entry. Had they desired to add to the invoice value to make market value, it was plainly their duty, under the first provision quoted from subsection 7, to have done so at the time of making the entry and not afterwards. The same sources of information, namely, catalogues showing the value (if there be such which show the value conclusively, which is more than doubtful), were open to the brokers as were open to the appraiser, and the provision limiting the right to add to make market value to the time of entry was for the purpose of obviating the necessity of the customs officials being forced to make their examination for the purpose of ascertaining values unaided by the best information which it was within the power of the importer to furnish.

We need not determine whether an entry may be so ridiculously at variance with value as to appear on its face to be a clerical error. If we assume that such a case might arise, this is not such a case. It would not do to say that the discrepancy here shown is one so great as to immediately show upon its face and at a glance that an error had been committed. It was as a result of an investigation by the appraiser that the value of this importation was advanced.

The case falls clearly within the holding of this court in *United States v. Swedish Produce Co.* (4 Ct. Cust. Appls., 223; T. D. 33437). In this case, as in that, the items were duly set forth on the invoice and the amounts extended were correct according to the quantities and unit price specified with the description of the merchandise. The total values were carried into the entry exactly as invoiced. It was said:

If relief under said subsection 7 is confined to those cases where the error must appear upon the face of the papers to be sent to and which are before the appraiser and the collector at the time of the appraisement and decision thereupon, respectively, it negatives any fraud upon part of the importer. Second, it gives relief in those cases only which call the attention of the appraising officers to the correct valuation of the merchandise, thereby affording them opportunity at the time of the appraisement and decision thereupon to affix the correct market value of the merchandise. Third, any rule which permits this provision of the statute to be extended to those cases not obviously made apparent by the papers to the eye of the appraiser and collector, and resting the case upon the possibility of proof *dehors* said record, must put a premium upon fraud or attempted frauds upon the revenues. It is contrary to our understanding of the word "manifest," as used in the common parlance, which requires something obvious or exposed to view.

Again, in *United States v. Wyman* (4 Ct. Cust. Appls., 264; T. D. 33485), it was said of an item claimed to be erroneously entered:

This statement of the importers' claim clearly shows that the disputed item, even if nondutiable in character, did not result from a manifest clerical error. The item in question was entered in the invoice in the words and figures intended by the writer; they were interpreted by the collector with the meaning and effect which were intended by the writer at the making of the invoice. This statement negatives the occurrence of a merely clerical error. The clerk who prepared the entry may have misunderstood the law relating to such items, he may have misunderstood the facts, or he may have entered the item inadvertently. Nevertheless, clerically the item was not incorrect, for it stood in the invoice in form and substance as the clerk intended to enter it, and the entry correctly carried the intended signification to the mind of the collector. In such a case it can not be said that the item was a clerical error, much less can it be said that it was a manifest clerical error. For whatever inaccuracy existed in the entry was the result of inaccurate intention on the accountant's part and not of the clerical execution of that intention.

The case is apparently one of some hardship, as must be every case in which no intent to defraud on the part of the importer appears and by inadvertence or inattention obligation to pay a higher rate of duty has been incurred. But, as was said by the court in *Hoeninghaus v. United States* (172 U. S., 622)—

The meaning and policy of the tariff laws can not be made to yield to the supposed hardship of isolated cases. * * * The administration of such laws can not be narrowed to a consideration of every case as if it stood alone and as if the only ques-

tion was whether there was an actual intention to defraud the Government. * * * If the statutory regulations are found to be too stringent, the remedy can not be found either in the courts whose duty is to construe them or in the executive officers appointed to carry them into effect, but in Congress.

The decision of the Board of General Appraisers is *reversed*.

STIRN *v.* UNITED STATES (No. 1135).¹

SPUN SILK IN BEAMS A SINGLE ENTITY.

The merchandise is spun silk on beams, dutiable under that title at a specific rate (paragraph 397, tariff act of 1909). The beams were separately assessed with duty as manufactures of wood. *Held*, that the beams should be admitted without separate assessment as parts of the entirety "spun silk on beams."

United States Court of Customs Appeals, January 14, 1914.

APPEAL from Board of United States General Appraisers, Abstract 31402 (T. D. 33217).
[Reversed.]

John Giblon Duffy for appellant.

William L. Wemple, Assistant Attorney General (*William A. Robertson*, assistant attorney), for the United States.

Before MONTGOMERY, SMITH, BARBER, and MARTIN, Judges.

MARTIN, Judge, delivered the opinion of the court:

The merchandise in the present case consists of spun silk wound upon beams. The beams are wooden cylinders from 4 to 6 feet long having iron caps fastened to their ends. These may be set into the bearings of a loom and the threads fed therefrom in the process of weaving. The beams are used repeatedly in making such importations until the caps become loose from wear, when they are regarded as worn out and are thrown away. They are said to be the only kind of beams upon which spun silk is imported into this country.

The collector assessed the silk with appropriate specific duty as spun silk in beams under paragraph 397 of the tariff act of 1909, and his action in that respect is conceded to be correct. In addition to the foregoing the collector also assessed separate duty upon the beams themselves at the rate of 35 per cent *ad valorem* as manufactures of wood under paragraph 215 of the act.

The importers protested against the separate assessment of the beams, claiming that Congress, by imposing a specific duty upon spun silk in beams, had considered the combination as a single entity, and had intended to admit the same upon payment of the specific duty alone. The protest was heard upon evidence by the Board of General Appraisers and was overruled, from which decision the importers now appeal.

The following parts of paragraph 397 of the tariff act of 1909 are sufficient for the present discussion:

397. Spun silk or schappe silk yarn, * * * if valued at exceeding one dollar per pound, in the gray, in skeins, warps, or cops, * * * on all numbers up to

¹ Reported in T. D. 34092 (26 Treas. Dec., 77).

and including number two hundred and five, forty-five cents per pound; * * * if valued at exceeding one dollar per pound, in the gray, in bobbins, spools, or beams, * * * on all numbers up to and including number two hundred and five, fifty-five cents per pound; * * * but in no case shall any of the goods enumerated in this paragraph pay less rate of duty than thirty-five per centum ad valorem.

The merchandise involved in the present case is identical with that in the case of *United States v. Stirn* (3 Ct. Cust. Appls., 62; T. D. 32350), which also arose under the tariff act of 1909. In that case, as in this, the collector not only assessed specific duty upon the silk in beams, but also separately assessed the beams themselves as manufactures of wood. The importers of the merchandise protested, presenting, however, but a single ground for their protest, namely, that the beams in question were the usual containers of spun silk, and therefore were entitled to free entry under subsection 18 of section 28 of the act. This court upon appeal held against that protest upon the ground that subsection 18 relates to usual containers of ad valorem merchandise, and not to usual containers of specific-duty merchandise, and therefore could have no application to the merchandise then at bar. The court further held upon the testimony that such beams were not the usual containers of spun silk, if that commodity alone were considered as the basis of assessment. However, in delivering the court's decision, Smith, Judge, observed as follows:

The protest makes no point as to the construction which should be placed on paragraph 397, and therefore, whether or not it was the intention of Congress to consider spun silk wound on beams as a single entity and to charge a specific duty on the silk in that particular form, we are not called upon to determine.

In the present case the protest rests solely upon the ground thus referred to, namely, that Congress, in enacting paragraph 397, considered spun silk in beams as a single entity, and intended to admit the same upon payment of the specific duty alone. The court therefore is now called upon to decide the issue which necessarily was left undecided in the former case.

It must be noted that the classification in question is not "spun silk," but is "spun silk in * * * beams." This classification certainly includes the beams quite as specifically as the silk, and can never become operative in the absence of either. While such beams are not the usual containers of spun silk in general, they are nevertheless essential components of spun silk in beams, and such is the merchandise named in the provision. These terms establish a status for the beams within the present classification similar to that enjoyed by usual containers as essential parts of dutiable merchandise at importation. Usual containers of specific-duty merchandise are admitted to entry without separate assessment upon the presumption that Congress considers such containers as parts of the dutiable merchandise under assessment and intends that the specific duty shall cover the entire merchandise. In the present case, however, nothing

is left to mere presumption, for the terms of the classification provide that the dutiable merchandise shall consist of both silk and beams. The silk and the beams are thus expressly united as the basis of assessment. Duty is imposed by the paragraph at a certain specific rate, assessable according to the weight of the silk, and when this specific duty is assessed it covers the entire combination.

The view just expressed is in harmony with the reasoning of this court in the case of *United States v. Ringk* (4 Ct. Cust. Appls., 349; T. D. 33530). That case related to the assessment of wooden spools upon which artificial or imitation silk yarn and imitation horsehair had been wound, and which were assessed with duty under paragraph 405 of the act of 1909. De Vries, Judge, in delivering the court's decision says:

The fact that Congress in laying duty upon other threads and yarns in this tariff act upon spools made special provision therefor, affixing thereupon special rates of duty—for example, in paragraphs 313 and 314 for spool thread of cotton, etc., 346 for tapes on spools, and 397 for silk thread at different rates on yarns in skeins, warps, beams, cops, or spools—is significant that the omission of such a provision with reference to this class of importations indicated the purpose of Congress not to include within the rate of duty herein specified the assessment of the spools or cops upon which it is wound for dutiable purposes.

For the purpose of illustration let it be supposed that the classification, "spun silk in beams," appeared within the free list, instead of being dutiable. It is well known that duty-free merchandise secures free entry at importation for the usual containers thereof. This rule proceeds upon a principle analogous to that which exempts the usual containers of specific-duty merchandise from separate assessment, for in both instances the usual containers are considered as parts of the imported merchandise.

If Congress had provided for the free admission of "spun silk in beams," can it be doubted that the beams in question would be free of duty as well as the silk wound upon them? For the silk would not really be free of duty if the act required that it must be imported in beams which at the same time were made subject to duty.

It will be observed that the final sentence in paragraph 397 provides that in no case should the articles therein enumerated pay a less rate of duty than 35 per cent ad valorem. It is argued by the Government that if this ad valorem rate should become operative upon any importation, the value of the beams, under subsection 18 of section 28, would be included for assessment within the dutiable valuation of the merchandise. The Government contends that, according to the importers' construction, the beams would be admitted free if the merchandise were assessed with specific duty, but would be dutiable as part of the dutiable valuation of the merchandise under an ad valorem assessment, thus making the dutiability

of the beams to depend upon the mere form of assessment. It is urged by the Government that this result is unreasonable and makes the importers' construction untenable.

It must be remembered, however, that under paragraph 397 silk in beams bears a higher specific duty than similar silk in skeins, there being a difference of 10 cents a pound in the relative rates of duty. On the other hand, the ad valorem rate imposes the same duty upon silk in skeins and in beams. In either case, therefore, the wound silk would pay a higher duty than that in skeins, even according to the contention of the importers. Under the specific duty this would result from the higher rate imposed upon the beam silk as compared with the skein silk; while under the ad valorem duty it would result from the inclusion of the value of the beams within the dutiable valuation of the merchandise. Such an increase in duty might be expected from the fact that the wound silk is more advanced in condition than the unwound. However, according to the Government's contention, this advance in condition is twice taxed under the provision for specific duty, for not only would the silk in beams pay 10 cents a pound more duty than that in skeins, but at the same time the beams themselves would pay additional duty under a separate assessment. It is not probable that Congress intended to double-tax the increase of value resulting from the winding of the silk upon the beams, first, by adding 10 cents a pound to the specific duty imposed upon the wound silk as compared with that in skeins, and second, by assessing duty at the same time upon the beams themselves as if they were a separate importation.

In this connection, it should be noted that under the tariff acts of 1890 and 1894 silk in skeins and silk in beams were subject to an ad valorem duty only, the same rate being imposed upon both. In the tariff act of 1897 both kinds were alike dutiable at a graded specific rate per pound and 15 per cent ad valorem, with a minimum provision for 35 per cent ad valorem upon both alike. However, in the tariff act of 1909 both beam silk and skein silk were for the first time subjected primarily to a specific duty only. It is significant that under these circumstances the primary duty upon beam silk for the first time was made higher than the primary duty upon skein silk, leaving the minimum ad valorem duty still the same for both. This change of policy seems to indicate a legislative intention to cover the advanced condition of the beam silk by means only of the higher specific duty imposed upon that article, upon the assumption that under a specific assessment no additional duty would be exacted from the beams themselves.

The court therefore concludes that the appellants are entitled to the relief which they seek, and the decision of the board is *reversed*.

HAMPTON, JR., & Co. v. UNITED STATES (No. 1186).¹

REDUCTION OF ENTERED VALUE—WHEN NOT ALLOWED.

The entry, the invoice, and the replace invoice submitted to the Secretary of the Treasury all showed that the value of the wool exceeded 12 cents per pound, and there was no indication of error in stating the value or the charges to be deducted therefrom to make actual market value; and the entry itself, once made and verified, could not be corrected by the importer or the collector. The correction of the entry was properly denied on the papers submitted.—United States v. Zuricady (71 Fed., 955) distinguished.

United States Court of Customs Appeals, January 14, 1914.

APPEAL from Board of United States General Appraisers, Abstract 31984 (T. D. 33338).

[Affirmed.]

Walter Evans Hampton for appellants.

William L. Wemple, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, of counsel), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

SMITH, Judge, delivered the opinion of the court:

Thirteen bales of Zackel wool, purchased by Chas. Bloch & Co. from George Whitaker & Co., of Bradford, England, and weighing 3,225 pounds, were imported at the port of Philadelphia on October 22, 1911. The importation was invoiced at 22 cents per pound, or a total of \$709.50, which amount was averred in the invoice to be the equivalent of £145.13.9, money of the country in which the purchase was made. It appeared on the face of the invoice that in the £145.13.9 there was included—freight, £2.17.6; insurance, 5 shillings 1 pence; and the consular fee of 10 shillings 4 pence, making a total of £3.12.11 nondutiable charges. The importers deducted these charges from the total value of £145.13.9, and entered the wool at the customhouse on October 23, 1911, as of the value of £142.0.10, or \$691. The entered value of £142.0.10 was certified to the appraiser, and the appraiser found the actual market value of the wool to be 11½ cents instead of 22 cents per pound at the time of exportation to the United States. On December 5 the importers presented to the collector of customs a replace invoice, in which, as in the original invoice, the total price was alleged to be £145.13.9, or \$709.50, the equivalent in American money. In addition to the nondutiable charges specified in the original invoice there was included in the replace invoice, however, an item of £26.9.9 duty on the wool at 4 cents per pound. The importers followed the replace invoice by an application to correct the entry and to lower the entry value to 11½ cents per pound on the ground of manifest clerical error. This application was transmitted to the Secretary of the Treasury on

¹ Reported in T. D. 34093 (26 Trans. Dec., 81).

January 22, 1912, and denied by him on January 31, 1912, for the reason that the market value of the wool, as shown by the replace invoice, was still more than 12 cents per pound and that no manifest clerical error had been shown. On April 4, 1912, the entry was liquidated at the entered value of 22 cents per pound and duty assessed on the goods at 7 cents per pound under that part of paragraph 370 of the tariff act of 1909 which reads as follows:

370. * * * On wools of the third class, * * * the value whereof shall exceed twelve cents per pound, the duty shall be seven cents per pound.

On April 8, 1912, the importers protested that the merchandise was not dutiable at 7 cents, but at 4 cents per pound. As grounds for the claim that the wool was not dutiable as assessed the importers alleged in their protest that the invoiced and entered value of 22 cents per pound was the price at which the goods were sold to the purchaser in the United States, which price included the profit of the seller, inland carriage, ocean freight, marine insurance, duty, and landing charges in the United States, and that the invoicing of the goods in that manner was an error manifest to the understanding which, if corrected, would make the goods dutiable at 4 cents per pound under paragraph 370, the part of which pertinent to the protest reads as follows:

370. On wools of the third class, * * * the value whereof shall be twelve cents or less per pound, the duty shall be four cents per pound.

The papers were transmitted to the Board of General Appraisers for determination of the issues raised by the protest, and on the hearing before the board, in addition to the record forwarded by the collector, there was submitted for the consideration of that tribunal the affidavit of George Whitaker, a member of the firm of George Whitaker & Co., of Bradford, England, which affidavit, under stipulation, was admitted in evidence for the purpose of showing clerical error only. In this affidavit Whitaker stated that the value set out in the invoice was the price at which the wool was sold to Chas. Bloch & Co., and included the market value in Bradford, ocean freight from Bradford to Philadelphia via Liverpool, insurance, consular invoice fee, duty in the United States, and the firm's profit on the sale. The affidavit further averred that the invoice clerk of the firm made an error in stating that the value of the wool was 22 cents per pound, and that the invoice should have been made out on a consigned form of consular invoice to the Boston representative of the shipper at 5½ pence per pound, which was the wholesale market value in Bradford. To the affidavit was attached a *third* invoice which, in addition to the deductible charges mentioned in the original invoice and the replace invoice, contained a charge of 13 shil-

lings for bags and 37 pounds 12 shillings and 10 pence for seller's profit. This third invoice, so far as appears from the record, was never submitted either to the collector or the Secretary of the Treasury.

The Board of General Appraisers overruled the protest, and this appeal was taken on the ground that the board erred in not finding that the entered and invoiced value was a manifest clerical error.

At the time the collector assessed duty on the importation he had before him the entry of the importers, the original invoice, and the decision of the Secretary of the Treasury denying the application for the correction of the entry, which application was based on the replace invoice transmitted therewith. The entry, the invoice, and the replace invoice submitted to the Secretary of the Treasury all showed that the value of the wool exceeded 12 cents per pound, and none of those documents bore on its face any indication whatever that any error had been made in stating the value or the charges deductible therefrom to make actual market value. The appraiser's return did show a valuation of only 11½ cents per pound, but as the collector was forbidden by the provisions of subsection 7 of section 28 of the tariff act of 1909 to assess duty in any case upon an amount less than the entered value, it is apparent that he had no recourse except to assess duty on the value as declared by the importers. In cases of undervaluation arising from manifest clerical error subsection 7 does provide that *additional duty* shall not be imposed, but clearly that provision, even if it be conceded that it permits the collector to determine the existence of manifest clerical error, warrants nothing more than relief from additional duties. Certainly it does not authorize the collector to ignore the positive mandate of the very same section that "duty shall not, however, be assessed in any case upon an amount less than the entered value." In brief, under subsection 7, whether there is a manifest clerical error or not, the collector of customs can not of his own motion assess the goods at less than entered value. *In re Irwin & Sons* (T. D. 25764); *Fuerst v. United States* (U. S. Circuit Court, Southern District of New York; T. D. 26658); *Vantine v. United States* (91 Fed. Rep. 519); *United States v. Foard* (U. S. Circuit Court, District of Maryland; T. D. 30936); *United States v. Wyman* (4 Ct. Cust. Appls., 264; T. D. 33485); *Ballard v. Thomas* (19 How., 382); *Kimball v. Collector* (10 Wall., 436, 453); *Saxonville Mills v. Russell* (116 U. S., 13, 18, 20).

Any errors in stating the value in the invoice may be corrected by the importer at the time of making and verifying his entry, but not afterwards. (Subsec. 7, sec. 28, tariff act of 1909.)

The entry itself, however, once made and verified can not be corrected by the importer, and neither can it be corrected by the collector—certainly not in cases involving a reduction of the entered

value. The power to correct the entry was confided by Congress to the Secretary of the Treasury by the provisions of subsection 23 of section 28 of the tariff act of 1909, and its exercise was expressly limited by that section to cases of manifest clerical error. Subsection 23, in so far as it is pertinent to the question here involved, reads as follows:

23. * * * The Secretary of the Treasury is hereby authorized to correct manifest clerical errors in any entry or liquidation, for or against the United States, at any time within one year of the date of such entry, but not afterwards: *Provided*, That the Secretary of the Treasury shall, in his annual report to Congress, give a detailed statement of the various sums of money refunded under the provisions of this act or of any other act of Congress relating to the revenue, together with copies of the rulings under which repayments were made.

The application made in this case to the Secretary of the Treasury to reduce the entered value was based on a replace invoice which showed on its face a total price of £145.13.9 for the wool, subject to a deduction of the following charges:

| | £ | s. | d. |
|--|----|----|----|
| Freight, Bradford to Philadelphia, at 40/-..... | 2 | 17 | 6 |
| Insurance..... | | 5 | 1 |
| Consular fee..... | | 10 | 4 |
| Duty at 4 cents per pound (the market value of the wool being 5½d. per pound)..... | 26 | 9 | 9 |
| Total..... | 30 | 2 | 8 |

Deducting from £145.13.9 the charges, amounting to £30.2.8, left a market value for the wool of £115.11.1, which, reduced to American money at \$4.8665, the value of the pound sterling proclaimed by the Secretary of the Treasury for the quarter in which the goods were imported, gave \$562.34, or \$0.1743 per pound as the value of the wool in our money. Evidently, therefore, the Secretary of the Treasury was fully warranted in finding that the value of the wool as shown by the replace invoice was more than 12 cents per pound, and that the importers had failed to establish any manifest clerical error which would justify his correcting the entry. Indeed, the only clerical error which appeared on the face of the replace invoice was the parenthetical statement that the market value of the wool was 5½ pence per pound, a valuation which was at variance with the actual figures set out in the document and upon which the importers relied to show manifest clerical error. Assuming, without conceding, that the Secretary's decision is subject to review, it is obvious, therefore, that correction of the entry was properly denied on the papers submitted and that the ruling to that effect ought to be sustained.

If there be any inherent power in the board or the courts to correct mistakes in entries and invoices not made manifest by the papers themselves, and we do not say that there is, it certainly can not be exercised to correct errors disclosed for the first time by evidence produced on the hearing before the board and not apparent at the time the official action complained of by the importers was taken.

The decision in *United States v. Zuricaldy* (71 Fed., 955), cited by importers in support of their protest, is not in point. In that case the consul, over the protest of importers, increased the invoice value by the addition of ocean freight and forced the importers to accept an invoice stating a value which they asserted was not the true market value of the goods. Under such circumstances the importers acted under compulsion and they were not foreclosed by a market value which was not voluntarily presented by them to the collector. *Robertson v. Bradbury* (132 U. S., 491).

In the case of *Gillespie v. United States* (124 Fed., 106), which is likewise relied on by the appellants here, the agent of the importers, immediately upon entry, pointed out to the collector an error of overvaluation which had been committed and the collector assented to its correction. The court held that the error was seasonably brought to the attention of the collector while the case was still pending before him, and based its conclusion on the rule laid down in *United States v. Zuricaldy*, *supra*, and *United States v. Benjamin* (72 Fed., 51). *United States v. Zuricaldy* involved no question of error on the part of the importers, and, as already stated, that case held simply that the importer was not bound by an invoice which he was obliged to present under compulsion. In *United States v. Benjamin* there was a manifest clerical error apparent on the face of the papers, inasmuch as it appeared that five items of merchandise were valued at 0.60 mark per dozen and the sixth item of the same merchandise at 6 marks per dozen. As the value of the five items was found to be 0.60 mark per dozen by the appraiser, it followed that the sixth item, which was valued at 6 marks per dozen, was manifestly incorrect. We must, therefore, decline to accept *Gillespie v. United States* as authority for the correction of an error not manifest on the face of the papers. In this matter no error was pointed out immediately upon entry, and the papers upon which the importers relied to show that the wool was of a value less than 12 cents established that it was worth in fact more than 12 cents per pound, and consequently dutiable as assessed.

The decision of the Board of General Appraisers is *affirmed*.

SCIENTIFIC SUPPLY IMPORTING CO. v. UNITED STATES (No. 1195).¹

1. GLASS BLOWN IN A MOLD.

The general rule is that an excepting clause relates to what immediately precedes it, and that it will be so construed unless the legislature has clearly manifested a contrary intent, and there is in paragraph 98, tariff act of 1909, no indication of intent to apply the exception to what follows as well as to what goes before it. The given articles of glass blown in a mold were dutiable under that paragraph.

2. COLORED GLASS FUNNELS.

In said paragraph 98 it was intended to declare that if an article otherwise within the paragraph was susceptible of use as a container, no difference should be made in its assessment whether unfilled or filled, as imported, with contents dutiable or free.—*Stern v. United States* (105 Fed., 937); *Dingelstedt v. United States* (91 Fed., 112) distinguished.

United States Court of Customs Appeals, January 14, 1914.

APPEAL from Board of United States General Appraisers, G. A. 7436 (T. D. 33216)

[Affirmed.]

Jules Chopak, jr. (*Walter Evans Hampton* of counsel), for appellant.

William L. Wemple, Assistant Attorney General (*Leland N. Wood*, special attorney, on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

BARBER, Judge, delivered the opinion of the court:

The classification of many articles represented by numerous exhibits was involved in the hearing before the Board of General Appraisers in this case. Some protests were overruled and some sustained. Some exhibits are broken, and the Government's brief indicates an uncertainty as to precisely what merchandise is involved in this appeal.

The importers' brief, however, states that the merchandise may be divided into two classes—

(1) That covered by the third finding of the board, as glass boxes or dishes, blown in the mold, with covers ground, the grinding costing more than the blowing.

(2) Funnels or other similar articles, not designed or susceptible for use in holding liquids, solids, or semisolids.

The third finding of the board is as follows:

3. Glass boxes or dishes, some being rectangular in shape and others cylindrical, all blown in a mold, with covers, both the boxes and the covers therefor being ground for the purpose of fitting, which grinding in Exhibits 4 and 13 costs more than the articles before grinding, while in Exhibits 9, 14, and 21 the glass boxes or dishes are of more value than the grinding.

The seventh finding of the board, which we take it relates to the importer's second above classification, is as follows:

7. Funnels with receptacles composed of amber-colored glass blown in a mold, the receptacle having a molded handle attached by annealing, the blown glass being the component material of chief value, represented by Exhibit 11.

This case is disposed of with the understanding that the importer's description of the merchandise is correct.

¹ Reported in T. D. 34094 (26 Treas. Dec., 86).

No claim is made that the board erred as to any finding of fact relating to the conditions or character of the merchandise, but error is claimed in that an assessment under paragraph 98 of the tariff act of 1909 was sustained, it being claimed by the importer that as a matter of law the merchandise should have been held dutiable under paragraph 109 of the same act.

The two paragraphs are as follows:

98. Glass bottles, decanters, and all articles of every description composed wholly or in chief value of glass, ornamented or decorated in any manner, or cut, engraved, painted, decorated, ornamented, colored, stained, silvered, gilded, etched, sand blasted, frosted, or printed in any manner, or ground (except such grinding as is necessary for fitting stoppers or for purposes other than ornamentation), and all articles of every description, including bottles and bottle glassware, composed wholly or in chief value of glass blown either in a mold or otherwise; all of the foregoing, not specially provided for in this section, filled or unfilled, and whether their contents be dutiable or free, sixty per centum ad valorem: *Provided*, That for the purposes of this act, bottles with cut-glass stoppers shall, with the stoppers, be deemed entireties.

109. Stained or painted glass windows, or parts thereof, and all mirrors, not exceeding in size one hundred and forty-four square inches, with or without frames or cases, and all glass or manufactures of glass or paste or of which glass or paste is the component material of chief value, not specially provided for in this section, forty-five per centum ad valorem.

The importer argues that when articles are ground for purposes other than ornamentation they are excluded from paragraph 98 by the excepting clause, "except such grinding as is necessary for fitting stoppers or for purposes other than ornamentation," and that where the cost of grinding is greater than blowing the article is not dutiable under said paragraph.

This contention manifestly relates to the first class of the merchandise involved in this appeal.

It is apparent that the paragraph embraces two general classes of glassware, the first class being mentioned before the excepting clause and the second class after it. Whatever may be included in the first class, Congress expressly declares that the second class covers "all articles of every description, including bottles and bottle glassware * * *, blown either in a mold or otherwise." This language is comprehensive and specific, clear and unambiguous, and when an article within its terms is not otherwise specially provided for it must be classified thereunder.

The merchandise we are now considering is concededly glass blown in a mold and so within the quoted provision, unless the fact that it is ground excludes it therefrom. But although ground it is still a glass article blown in a mold. It is true that the grinding may render it more useful and serviceable, but it has not changed its form or shape or converted it into a manufacture of glass; it is no new or different article than was produced by the original process of blowing the glass in a mold, only more useful.

The exception in the paragraph does not apply to what follows it.

The general rule is that an excepting clause relates to what immediately precedes it, and that it will be so construed, unless the legislature has clearly manifested a contrary intent. *Hensel v. United States* (3 Ct. Cust. Appls., 117; T. D. 32366); *United States v. Cohn* (3 Ct. Cust. Appls., 273; T. D. 32571).

We find here no indication of a congressional intent to apply the exception to what follows as well as to what goes before it. The punctuation and grammatical construction indicate otherwise. There is full scope for the application of the exception, if it be held to limit only what goes before it, because the first part of the paragraph may clearly relate to articles not blown in a mold or otherwise, and by so limiting its application full effect is given to the specific and comprehensive language used in describing the articles which follow the exception.

As to class 2, the colored glass funnels or similar articles not designed or susceptible for use in holding liquids, solids, or semisolids, the importer claims that the provision in the paragraph that "all of the foregoing not specially provided for in this section, filled or unfilled, and whether their contents be dutiable or free" removes from its purview everything otherwise classifiable thereunder that can not be successfully used as a container.

It is urged that the case of *Dingelstedt v. United States* (91 Fed., 112), which considered paragraph 86 of the tariff act of 1894 relating to "all articles composed of earthen or mineral substances not specially provided for, if decorated, * * * if not decorated," and held that merchandise to come within the purview of the paragraph must be *susceptible* of decoration, is in point and is controlling, especially in view of the fact that the Supreme Court, in *United States v. Downing* (201 U. S., 354), apparently approved such construction of that particular statute, although its decision was upon other grounds.

There is, however, we think, a manifest difference in the structure and language of the paragraph referred to in the *Dingelstedt* case and the one here under consideration. The paragraph there construed expressly related to articles "if decorated" and "if not decorated." Here, however, the first line of the paragraph includes articles "of every description" and later again refers to blown glass articles "of every description," all of which are declared dutiable under the paragraph, and it is manifest that this language includes articles which are not containers.

The use of the words "if decorated" and "if not decorated" in the statute before the court in the *Dingelstedt* case might have warranted, in view of the reasons suggested therefor, the construction given thereto, but we do not think it is controlling here.

Paragraph 98 should not be given the construction claimed by the importer because, when read as a whole, we think it clearly shows that by the use of the words "filled or unfilled" Congress simply

intended to declare that if an article otherwise within the paragraph was susceptible of use as a container it should make no difference in its assessment whether it was filled or unfilled when imported, neither should it be affected by the fact that its contents were dutiable or free. In other words, out of abundant caution Congress declared that such facts should not affect the rate of duty.

In the case of *Stern v. United States* (105 Fed., 937) the same Circuit Court of Appeals in which the *Dingelstedt* case was decided held that paragraph 100 of the act of 1897, which was the predecessor of paragraph 98 now before us, and which for the purposes of that decision is not materially different from paragraph 98, was not susceptible of the construction claimed by the importer here and in its decision reviewed the *Dingelstedt* case. The reasoning of the court, which it is unnecessary to repeat, by which it reached its conclusion we think is applicable to paragraph 98, and is eminently sound. See also *Hempstead v. United States* (158 Fed., 584), where the Circuit Court of Appeals for the Third Circuit fully reviews the three cases referred to relating to this question. *In re Scoville & Adams Co.*, G. A. 4298 (T. D. 20214).

It is said in the Government's brief that these funnels, being of colored glass, are, if for no other reason, dutiable under paragraph 98. While probably the assessment of these articles might be sustained upon that view alone on the authority of *United States v. Wakem* (2 Ct. Cust. Appls., 411; T. D. 32170), we think the assessment below is equally sustainable upon the view first suggested, and as counsel for the importer expressly asks that its first contention be decided, in view of the fact that other protests on that point are pending, we have considered the same.

The judgment of the Board of General Appraisers is *affirmed*.

GALLAGHER & ASCHER *et als.* v. UNITED STATES (No. 1203).¹

PUMICE STONE, PARTLY MANUFACTURED.

Paragraph 89, tariff act of 1909, provides not only for manufactured and unmanufactured pumice stone, but also for partially manufactured pumice stone, and the filed or rolled pumice stone of the importation was dutiable thereunder.

United States Court of Customs Appeals, January 14, 1914.

APPEAL from Board of United States General Appraisers, G. A. 7462 (T. D. 33408) and Abstract 32433 (T. D. 33433).

[Affirmed:]

Lester C. Childs for appellants.

William L. Wemple, Assistant Attorney General (*Thomas F. Tumulty*, special attorney, on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

SMITH, Judge, delivered the opinion of the court:

The collector of customs at the port of New York classified a consignment of pumice stone as wholly or partly manufactured and

¹ Reported in T. D. 34095 (26 Treas. Dec., 90).

assessed it for duty at three-eighths of 1 cent per pound under that part of paragraph 89 of the tariff act of 1909 which reads as follows:

89. Pumice stone, wholly or partially manufactured, three-eighths of one cent per pound; * * *.

The importers protested that the pumice stone was unmanufactured, valued at over \$15 per ton, and therefore dutiable at one-fourth of 1 cent per pound under that part of paragraph 89 which reads as follows:

89. Pumice stone, * * * unmanufactured, valued at \$15 or less per ton, 30 per centum ad valorem; valued at more than \$15 per ton, one-fourth of 1 cent per pound.

The Board of General Appraisers overruled the protest and the importers appealed.

The pumice stone involved in the appeal was returned by the appraiser as "pumice stone in lumps which has undergone a process of manufacture either by filing or otherwise." From the testimony produced at the hearing by the importers it appears that this particular merchandise comes from Canneto-Lipari, Italy, and is taken out of the mines in large pieces, which are broken up and divided into grades according to quality. The rough edges and corners of the finer grades are removed by filing or by rolling the pieces of pumice in a cylinder so as to grind off inequalities and projecting points by the friction of one piece against another. The pumice stone in controversy has been either filed or rolled and is designed to be used in the production of smooth, polished surfaces or a high finish on woodwork and such manufactures as carriage bodies. Beyond filing or rolling the pumice stone, ordinarily nothing further is required to make it ready for use except to cut it in two.

From the evidence adduced at the hearing it is apparent to us that pumice stone broken into rough pieces, just as it is taken out of the mine, could not be conveniently handled or advantageously used by workmen as an appliance for finishing surfaces requiring a high polish. To fit the pumice for any such use and to make it ready for the hands of the workman, it is necessary that the rough edges and corners should be smoothed away by filing or rolling, and that the stone should be cut in two in order to provide a flat polishing surface. While, in our opinion, to constitute the completed article, ready for use, filing or rolling and cutting of the pumice stone are both necessary, yet the filing or rolling by itself fits it to some degree for efficient and advantageous use, and therefore it may be properly designated as pumice stone partially manufactured to distinguish it from the pumice stone which has been completely manufactured and from the pumice stone upon which nothing at all has been done to adapt it to its ultimate purpose. If paragraph 89 provided only for manufactured and unmanufactured pumice stone, we would be disposed to give serious consideration to the contention

of the importer that the importation should not be regarded as a manufactured article. The paragraph provides, however, not only for manufactured and unmanufactured pumice stone, but also for partially manufactured pumice stone, and we do not see how filed or rolled pumice stone can be classified as wholly unmanufactured without ignoring the manifest intent of Congress to lay a duty on pumice stone which is neither completely manufactured nor wholly unmanufactured.

The decision of the Board of General Appraisers is *affirmed*.

FENSTERER & RUHE *et al.* v. UNITED STATES (No. 1217).¹

PARTS OF LAMPS FOR BURNING GAS.

This article can not be said to be hollow ware of iron or steel similar to table, kitchen, and hospital utensils. The article is a part of a fixed device not complete in itself, lacking as it does the gas mantel and the globe which ordinarily accompany it, and it must be joined with a gas pipe when put in use. It was dutiable under paragraph 199, tariff act of 1909.

United States Court of Customs Appeals, January 14, 1914.

APPEAL from Board of United States General Appraisers, G. A. 7467 (T. D. 33508).

[Affirmed.]

Comstock & Washburn for appellants.

William L. Wemple, Assistant Attorney General (*Martin T. Baldwin*, special attorney, of counsel; *Henry H. Childers*, special attorney, on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

The merchandise in controversy consists of gas burners composed of various kinds of metal and other materials, metal chief value. It is claimed to be dutiable under paragraph 158 of the act of 1909, which reads as follows:

Table, kitchen, and hospital utensils, or other similar hollow ware, of iron or steel, enameled or glazed with vitreous glasses, but not ornamented or decorated with lithographic or other printing, forty per centum ad valorem.

The merchandise was assessed for duty at 45 per cent under paragraph 199 as "articles or wares not specially provided for in this section, composed wholly or in part of * * * steel."

An accurate description of the merchandise is found in the opinion of General Appraiser Fischer, which we quote:

These so-called burners are lamp parts made up of a tube-like covering of enameled sheet metal in which there are galvanized metal parts holding firmly within the covering a central brass tube, at one end of which is a device for regulating the air and gas supply to insure perfect combustion of the gas when in use and at the other end of which there is a magnesia tip for holding the ordinary gas mantle. The article has at one end a brass connection, so that it may be connected to a gas pipe, while at the other end there are brass screws to hold a globe.

Two things will be noted: First, that this article before being susceptible of use must be fixed to a gas pipe; secondly, it is not complete in itself and forms no utensil or implement adapted to

¹ Reported in T. D. 34096 (26 Treas. Dec., 92).

use. It lacks the gas mantle, which is an essential requisite to its usefulness, and also lacks the globe which usually accompanies it and provision for which is made. The question is, Can this be said to be hollow ware of iron or steel similar to table, kitchen, and hospital utensils? We think not. It is a part of a fixed device not complete in itself and which, when completed, would not be used as an implement or utensil in the ordinary sense in which those words are employed, but would be more in the nature of a fixture or, as termed in the Government's brief, a device. There is no such resemblance to table, kitchen, or hospital utensils or hollow ware as to constitute it in a tariff sense similar hollow ware of iron or steel.

The decision of the Board of General Appraisers is *affirmed*.

UNITED STATES *v.* HENDERSON (No. 1222).¹

SILVER SWEEPINGS.

The merchandise are sweepings of silver contained in sawdust, and it is imported so that the silver content may be reclaimed. It falls clearly within paragraph 643, tariff act of 1909, providing free entry for "sweepings of gold and silver."

United States Court of Customs Appeals, January 14, 1914.

APPEAL from Board of United States General Appraisers, Abstract 32848 (T. D. 33591).

[Affirmed.]

William L. Wemple, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, of counsel; *Henry H. Childers*, special attorney, on the brief), for the United States.

Comstock & Washburn for appellee.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

DE VRIES, Judge, delivered the opinion of the court:

The tariff act of 1909, paragraph 643, provides free entry for "ores of gold, * * * sweepings of gold and silver." Paragraph 479 of the dutiable section of that act prescribes a rate of 10 per cent ad valorem upon "waste, not specially provided for in this section, * * *." M. Henderson imported at the port of Niagara Falls, during the year 1912, 19 barrels of merchandise, which was entered by him as silver sweepings, entitled to free entry under the provisions of paragraph 643 aforesaid. The collector of customs at that port rated it for duty as waste not specially provided for under said paragraph 479. The importer protested and the Board of General Appraisers sustained the protest. This is an appeal by the Government from that decision of the Board of General Appraisers.

There is no serious question of commercial designation in the record. The decision of the Board of General Appraisers recites all the facts of the case:

These sweepings come off in buffing silver, and the buff wheels collect a quantity of the silver. A barrel of the sweepings examined contained sawdust, with a solution of silver sweepings saturated and mixed through it. Sawdust is scattered on the floor to pick up the silver. The witness was a silver and gold refiner and manufacturer of sterling silver and fine silver products. The only thing of value is the particles of silver in the sawdust.

¹ Reported in T. D. 34097 (26 Treas. Dec., 93).

These facts made apparent by the record as thus recited by the board are not seriously controverted. There is nothing in the record showing a commercial designation applicable to the imported merchandise or other meaning than as embraced within the natural signification of the words of the statute. The signification of those words as naturally suggested to the mind are in accord with the lexicographic definitions of the same. Thus in the Standard Dictionary "sweepings" are defined as follows:

The refuse from the floors of an establishment in which precious metals are worked or handled, preserved to reclaim particles of gold or silver.

Knight's American Mechanical Dictionary (Vol. III) defines "sweep washings" as follows:

The refuse of shops in which gold and silver are worked. These metals are separated by mechanical means and amalgamation.

Webster's Dictionary defines "sweepings" as follows:

The sweepings of workshops where precious metals are worked, containing filings, etc.

While there may be some rubbish or refuse in which this silver is lodged which otherwise might be characterized as waste, this importation, however, is precisely within the definitions of that class of waste made free by paragraph 643, *supra*. The record is uncontradicted that the only valuable content of the importation is the silver. The merchandise is imported in order that its silver content may be reclaimed. It is in perfect harmony, therefore, with the provisions of the free list making ores of gold and silver free (paragraph 643) that sweepings containing a silver content should be made free.

Affirmed.

WADDELL & Co. v. UNITED STATES (No. 1242).¹

1. BRICK.

The word "brick," other than fire brick, relates to brick used for structural or kindred purposes, and does not apply to all articles in which the word occurs as a designation.

2. RUBBING OR SCOURING BRICKS.

The importation is a stone, in brick shape it is true, but it is used in water in the process of rubbing, scouring, and cleaning marble, thus disintegrating in its use. It was properly assessed as an article or ware composed wholly or in chief value of earthy or mineral substances not specially provided for, not decorated, under paragraph 95, tariff act of 1909.

United States Court of Customs Appeals, January 14, 1914.

APPEAL from Board of United States General Appraisers, Abstract 33157 (T. D. 33660).

[Affirmed.]

Comstock & Washburn for appellants.

William L. Wemple, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, of counsel; *Samuel Isenschmid*, special attorney, on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

The goods in question consisted of scouring bricks. The appraiser reported the merchandise as "in the shape of bricks of various sizes.

¹ Reported in T. D. 34098 (26 Treas. Dec., 94).

They are composed of silica, iron oxide, alumina, lime, and magnesia." They are shown by the testimony to be known as rubbing bricks, scouring bricks, German brick, or Schumacher rubbing bricks, and by stipulation between the parties it is agreed that the merchandise is for scouring and is used for abrasive purposes in rubbing and cleaning marble. The merchandise was assessed for duty at 35 per cent ad valorem under the provision of paragraph 95 of the tariff act of 1909 for "articles or wares composed wholly or in chief value of earthy or mineral substances, not specially provided for, not decorated." They are claimed to be dutiable at 25 per cent ad valorem under paragraph 84 as "brick other than fire brick, not glazed, enameled, painted, vitrified, ornamented, or decorated in any manner," or at \$2 per ton under the provision of paragraph 90 for "clays or earths, wrought or manufactured, not specially provided for."

In the course of the proceedings below an order was made suppressing a deposition taken in Germany, and a motion was made to issue another commission to take testimony, which motion was overruled. It is argued that error was committed in these rulings. It is said in the brief of counsel that because the Government has universally contended that these scouring bricks were dutiable, if not at 35 per cent ad valorem under paragraph 95 as assessed, as articles or wares composed of earthy or mineral substances, then at the same rate of 35 per cent ad valorem under the provisions of paragraph 89 for "manufactures of pumice stone or of which pumice stone is the component material of chief value, not specially provided for;" that while the deposition of E. Schumacher failed to disclose all of the ingredients of these scouring bricks, it did show clearly that they were composed principally of gravel-like clay, and hence that they were not manufactures of pumice stone, and that to that extent at least the deposition was relevant and material. As the Government does not here contend that the articles are dutiable under the last clause of paragraph 89 as a manufacture of pumice stone, and as the importer, by a stipulation antedating the hearing below, waived his own claim under the earlier provisions of paragraph 89 for pumice stone wholly or partly manufactured, it is obvious that no injury was done to the importers' case by excluding the testimony to meet any claim which the Government might put forth under paragraph 89. We therefore do not deem it necessary to pass upon the rulings made by the board suppressing the deposition and refusing to issue another commission, and are not to be understood as intimating that any error was committed in either case.

The case is submitted upon the issue as to whether the goods were properly assessed or whether they should have been assessed as brick other than fire brick.

The paragraph under which the importers claim, after providing for fire brick, contains a further provision for "magnesite brick, chrome

brick, and brick other than fire brick, not glazed, enameled, painted, vitrified, ornamented, or decorated in any manner, 25 per centum ad valorem." The first impression given by reading this paragraph is that it is intended to include various kinds of brick which are used for structural or kindred purposes, and that it would be a departure from the intent of Congress to attribute to the word "brick" as here employed a meaning which should include an article which, instead of being used for such purposes, is used for a purpose which results in disintegrating and destroying the brick itself by its use. The testimony in the present case shows that the brick here in controversy is soaked in water before use and then used in water in the process of rubbing, scouring, and cleaning marble, thus disintegrating in its use. The fact that it resembles a brick in form does not in any way affect the question of its utility. It might be in any other form convenient to be handled and serve the same purpose. It is true that definitions may be found of a brick which might include such an article as is here involved. In the Oxford Dictionary a brick is defined as—

A substance formed of clay, kneaded, molded, and hardened by baking with fire, or in warm countries and ancient times by drying in the sun; used instead of stone as a building material.

But it is said in the brief of counsel that there are mentioned in the Century Dictionary bricks "not used for building purposes," "bath brick, Bristol brick, and carving brick; and among those of irregular sizes and shapes are feather-edged brick and gauged brick." But brick falling within these definitions have been held to be excluded from the provision for brick other than fire brick. The subject was first considered by the Board of General Appraisers in G. A. 1088 (T. D. 12316), and bath brick, which is one of the kinds of brick mentioned in the dictionary definitions, was held not to be within the meaning of the term "brick other than fire brick" and was held dutiable at 20 per cent as a nonenumerated manufactured article in the act of 1890.

The same merchandise (bath brick) was, in G. A. 3096 (T. D. 16217), held to be dutiable as an article composed of earthy or mineral substances, not decorated, under the tariff act of 1894.

But it having been determined in *Dingelstedt v. United States* (91 Fed., 112; 33 C. C. A., 395) that articles not susceptible of decoration were not dutiable under paragraph 97 of the act of 1897 as articles composed of earthy or mineral substances, not decorated, the board, in G. A. 4921 (T. D. 23028), held bath bricks dutiable as nonenumerated manufactured articles. The act of 1909, in paragraph 95, having, by the introduction of the words "whether susceptible of decoration or not" enlarged the scope of the paragraph and having overcome the objection to the classification of such articles as those here in question, under the provision for articles composed of earthy or mineral substances, the board again recurred to its former holding and held bath bricks dutiable under the pro-

visions of paragraph 95, in G. A. 7055 (T. D. 30752). The court's decisions as to bath brick have therefore been uniform save as the board has necessarily departed from its first holding to conform to the rule of the Dingelstedt case, only to return to the same ground when new legislation justified it. But throughout the board has consistently maintained that the term "brick other than fire brick" was not intended to include all articles called brick, or in which the word brick occurred in its designation, a view that is consistent with our own construction of phrases bearing some analogy. See *United States v. Burlington Co.* (3 Ct. Cust. Appls., 378; T. D. 32967) and *United States v. Walter* (4 Ct. Cust. Appls., 95; T. D. 33371). We think the rulings of the board are based upon sound reasoning, and without regard to the added force given to these rulings by a subsequent reenactment of the clause construed we should have no difficulty in reaching the same conclusion.

The case of *Traitel v. United States* (131 Fed., 994), in which it was held that the so-called Welsh quarries were dutiable as brick other than fire brick, is not inconsistent with the views of the board expressed in these cases. The substance of the board's holding is that the word brick, other than fire brick, relates to brick used for structural or kindred purposes. In the *Traitel* case the articles in question were Welsh quarries so used. The contesting provision in that case was for tiles under paragraph 88 of the tariff act of 1897. But the court said:

It appears from the great weight of evidence that quarries are unlike tiles, and in material, quality, texture, and the use to which they may be applied closely resemble brick. They should therefore have been classified by similitude, under the provisions of paragraph 87, for "brick, other than fire brick," etc.

No such question of similitude arises in this case. The decision of the board is *affirmed*.

KRAEMER & CO. *v.* UNITED STATES (No. 1247).¹

SHEETS OF ILLUSTRATIONS IMPORTED SEPARATELY.

These illustrations were imported for use as pages of a magazine, but came in separately from the text of the magazine. Paragraph 634, tariff act of 1909, granted free entry to "periodicals," but this provision does not extend to parts of periodicals imported alone. They were properly assessed as "prints not lithographed on surface-coated paper," paragraph 411, tariff act of 1909.

United States Court of Customs Appeals, January 14, 1914.

APPEAL from Board of United States General Appraisers, Abstract 33121 (T. D. 33660).

[Affirmed.]

John J. Kirby for appellants.

William L. Wemple, Assistant Attorney General (*Henry H. Childers*, special attorney, on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MARTIN, Judge, delivered the opinion of the court:

The present merchandise consists of 70,000 illustrations printed in colors upon individual sheets of surface-coated paper of the same

¹ Reported in T. D. 34099 (26 Treas. Dec., 97).

size as the pages of certain standard magazines. The illustrations were imported for use as pages of a magazine named the "International Studio," which is published in this country.

The collector assessed the illustrations with duty at 5 cents a pound and 30 per cent ad valorem as "prints not lithographed, on surface-coated paper," under paragraph 411 of the tariff act of 1909.

The importers protested, claiming free entry of the importations under the provision for "periodicals" contained in paragraph 634 of that act.

The protest was submitted on evidence to the Board of General Appraisers and was overruled. The importers now appeal from that decision of the board.

The following is a copy of paragraph 634, under which the importers claim free entry of the merchandise, and also of the relevant part of paragraph 411, under which the assessment in question was made:

(Free list.)

634. Newspapers and periodicals; but the term "periodicals" as herein used shall be understood to embrace only unbound or paper-covered publications issued within six months of the time of entry, devoted to current literature of the day, or containing current literature as a predominant feature, and issued regularly at stated periods, as weekly, monthly, or quarterly, and bearing the date of issue.

(Duty list.)

411. Papers with a coated surface or surfaces, * * *; printed matter other than lithographic, * * * five cents a pound and thirty per centum ad valorem; * * *

The sole question involved in the present case is whether the importations at bar are governed by the provision for periodicals contained in paragraph 634; for if they do not come within that provision they would clearly be dutiable under paragraph 411, as assessed.

It appears from the testimony that the International Studio is a magazine which comes within the definition of a periodical as given by paragraph 634. It is a paper-covered publication, devoted to the current art literature of the day, or containing such current literature as a predominant feature; it is issued monthly and each copy bears the date of its issue. It also appears that two concurrent editions of the magazine are issued each month, one in England and the other in this country. The American edition is made up of pages which are identical with those composing the English edition, combined, however, with certain additional pages relating particularly to American art which are printed for that purpose in this country. The English pages which go into the American edition are printed abroad and are imported into this country in the form of flat, uncollated, and unfolded sheets. These consist in part of reading matter and in part of illustrations in colors, such as are involved in the present case. The pages which contain reading matter are numbered with Arabic numerals, the same as are those of the English edition. The illustrations, however, are not numbered in either edition; and the addi-

tional pages printed in this country bear Roman numerals not in series with the imported pages.

It is stated in the testimony that during the past 15 years the importers have continuously imported such printed and illustrated sheets, shipped together, for their magazine; and that all the time such importations were passed free of duty under the provision for periodicals in the tariff acts of 1897 and 1909. In the present instance, however, owing to a labor strike in Liverpool, the cases containing the illustrations of the English edition were separated from those containing the reading matter, and each class of articles arrived and was entered separately. The printed sheets containing the reading matter, thus separately arriving, were given free entry by the collector, under the classification of periodicals, but the illustrations were refused free entry under that name and were assessed with duty under the title of printed matter, as above stated. The illustrations in question were imported in July, 1912, and were intended for the August, 1912, number of the magazine. As has been stated, the illustrations bear no date or page numbering; they coordinated in subject, however, with the printed articles which were also intended for the August number, and in fact both the illustrations and the reading matter afterwards appeared together, combined with the usual additional American pages, in the August, 1912, number of the magazine.

Under the foregoing statement the court is not required in the present case to determine whether the practice of admitting the English sheets free of duty under the provision for periodicals was correct or not, for it is clear that in any event the illustrations, if imported alone, can not be called periodicals within the statutory definition of that term. Taken alone they contained no literature of the day, they bore no date of issue, nor were they intended for separate publication. It is also true that while they were peculiarly suitable for use in connection with the August, 1912, number of the Studio magazine and were intended for use as part of that edition, and that similar illustrations were to appear concurrently in the English edition of the same number, nevertheless the imported illustrations were not incapable of other uses. Therefore the present importations must rest their claim for free entry either upon the theory that they were parts of periodicals and as such parts were within the provisions of paragraph 634, or that the separate entries of reading matter and illustrations, under the circumstances, should be construed to be a single entry of both materials and considered together with reference to the application of the paragraph in question.

The court, however, can not adopt either of these views. Paragraph 634 grants free entry to "periodicals," but this provision for

periodicals does not extend the same right to parts thereof if imported alone. This principle is so well established as to require no elaboration. *Robertson v. Gerdan* (132 U. S., 454); *United States v. Schoverling* (146 U. S., 76); *Vandegrift case* (T. D. 30272 and cases therein cited). Nor was the collector required or authorized to inquire into the circumstances of the separate entry of the present merchandise in order to learn whether such merchandise had been shipped or intended to be shipped together with certain other merchandise as a means of determining the dutiable status of the separate importation. No authority is cited by counsel in support of such a contention, and the confusion of administration which would attend upon such action by the collector seems to be sufficient reason for assuming that no such authority exists.

The decision of the board is therefore *affirmed*.

THOMSEN & Co. v. UNITED STATES (No. 1249).¹

WOOL—WHAT IS NOT CLERICAL ERROR.

There was a mistake made in the invoice in stating the cost of the wool of the importation. To constitute manifest clerical error, this must be apparent to the appraising officers or collector at the time of liquidation and upon the record itself. This is *stare decisis*. There was nothing in the record here to show the appraising officers or collector that the error was caused by an inaccurate statement of the price of the wool.—*United States v. Swedish Produce Co.* (4 Ct. Cust. Appls., 223; T. D. 33437); *United States v. Wyman & Co.* (4 Ct. Cust. Appls., 264; T. D. 33485); *United States v. Proctor Co.* (5 Ct. Cust. Appls., 44; T. D. 34091; *Hampton, jr., & Co. v. United States* (5 Ct. Cust. Appls., 51; T. D. 34093).

United States Court of Customs Appeals, January 14, 1914.

APPEAL from Board of United States General Appraisers, Abstract 33156 (T. D. 33660).

[Affirmed.]

Brown & Gerry for appellants.

William L. Wemple, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

DE VRIES, Judge, delivered the opinion of the court:

This appeal is founded upon an effort of Thomsen & Co., of New York, to be relieved from alleged excess duties imposed by the collector of customs at that port upon an importation of wool from Tientsin, China. While the protest counts solely upon the point that the wool was rated improperly for duty, the proven facts in the record show the claim to be founded upon a mistaken price written upon the invoice as the cost of the wool actually imported. During 1909 *A. Walte & Co.*, of Tientsin, China, invoiced to Thomsen & Co., of

¹ Reported in T. D. 84100 (26 Treas. Dec., 100).

New York, 38 bales of wool. There is no controversy as to the facts, and while there are questions raised in this record as to the sufficiency of the protest and as to the admissibility of a deposition taken in China, we think the material question presented by the appeal may be here decided. The ultimate question presented is whether or not the error made by A. Walte & Co., in placing a mistaken and incorrect value on the wool actually imported upon the invoice, can, under the circumstances of this importation, be relieved against in this proceeding. It seems established by the record that A. Walte & Co. had purchased in China 244 bales, or 269.02 piculs of sheep's wool at 13.50 taels, making an aggregate of 3,631.77 taels. These 269.02 piculs of wool were willowed, which is a process of cleaning and segregating the same, giving a net outturn of cleaned and segregated wools—143.67 piculs of white wool and 4.57 piculs of black wool. The white wool was invoiced to Thomsen & Co. and the black wool retained by them in China. In making up the invoice, however, the aggregate price of both these classes and quantities of wool was set down as the invoice price of the white wool alone. The result was that the invoiced value of the white wool alone amounted to 25.27 taels per picul, while in fact the cost of the white wool alone was but 24.50 taels per picul. Upon the arrival in this country entry was made by Thomsen & Co. The entry papers bear some confusion. The entry was made for 19,156 pounds of wool, at 4,198 Tientsin taels—nondutiable charges deducted were 336.09 taels, leaving the dutiable value 3,861.91 taels. In reducing these Tientsin taels a mistake was made by the entrant, who wrote \$2,192, instead of the obviously correct sum of \$2,348. We regard this, however, as an unimportant circumstance in the case, for a reading of such an entry convinces of the intention and the fact that it was made in the sum of 3,861.91 taels. Both the invoice and entered values, therefore, of the importation were at more than 12 cents per pound for the wool. The claim is asserted by appellant, who was the importer, that the wool is dutiable under paragraph 370 as valued at less than 12 cents per pound. Said paragraph reads:

370. On wools of the third class and on camel's hair of the third class the value whereof shall be twelve cents or less per pound, the duty shall be four cents per pound. On wools of the third class, and on camel's hair of the third class, the value whereof shall exceed twelve cents per pound, the duty shall be seven cents per pound.

The one count of the protest is as follows:

Said wool is valued at twelve cents or less per pound. It is covered by, and is dutiable under, the first sentence of paragraph 370 at only four cents per pound.

There is no claim in the protest of a shortage or nonimportation in part of the invoiced merchandise. There was no appeal taken to reappraisement. The only legal ground therefore which can be

asserted upon this appeal from the decision of the Board of General Appraisers overruling the protest is one of clerical error or manifest clerical error. In view of the recent decision of this court we deem it unnecessary to here again review the authorities upon this subject.

While there may be some confusion or lack of uniformity in the interpretations and adjudications of the statute the present legislative status seems clear. Prior to the customs administrative act of 1890, sections 3012½ and 3013 of the Revised Statutes authorized the Secretary of the Treasury generally to refund any payments of duties shown to his satisfaction to have been excessive, and sections 5292 and 5293 of the Revised Statutes, and section 18, act of June 22, 1874 (ch. 391, 18 Stat., 186, 190) authorized the Secretary of the Treasury to remit or mitigate fines, penalties, and forfeitures incurred without willful negligence or fraudulent intent. These provisions were held to include additional duties for undervaluation. This legislative status presented no limitation as to such refunds confining them to manifest clerical errors. The act of March 3, 1875 (ch. 136, 18 Stat., 469) authorized the correction of errors in liquidation, whether for or against the Government, arising solely upon errors of facts. Upon the enactment of the customs administrative act of 1890 sections 3012½ and 3013 were specifically repealed by section 29 of that act. Section 24 of that act authorized the Secretary of the Treasury to correct only manifest clerical errors. Section 32 of the act forbade the remission or refund of additional duties except in "cases arising from a manifest clerical error." This legislative status undoubtedly confined relief in the premises both as to duties and penalties to cases of manifest clerical error only. Prior to the tariff act of 1909 the importer was permitted to add upon entry but not deduct. By the act of 1909, and subsection 7 of section 28 thereof, the right to deduct on entry was allowed the importer. It was urgently recommended to the Congress in 1909 that the previous power vested in the Secretary of the Treasury, by sections 5292 and 5293 of the Revised Statutes, of remitting additional duties when excessive, within his judgment, be restored. This recommendation was rejected by the Congress. The congressional enactment adhered to the previous language of the customs administrative law, confining relief in such cases to that of manifest clerical error only.

This court in *United States v. Swedish Produce Co.* (4 Ct. Cust. Appls., 223; T. D. 33437); in *United States v. Wyman & Co.* (4 Ct. Cust. Appls., 264; T. D. 33485); in *United States v. Proctor Co., and Hampton, Jr., & Co. v. United States*, decisions of even date with this, has adhered to the language of Congress in declaring that relief in such cases could only be granted where the error was both clerical and manifest upon the record before the collector at the time of liquidation.

In *United States v. Swedish Produce Co.*, *supra*, we said:

If relief under said subsection 7 is confined to those cases where the error must appear upon the face of the papers to be sent to and which are before the appraiser and the collector at the time of the appraisement and decision thereupon, respectively, it negatives any fraud upon part of the importer. Second, it gives relief in those cases only which call the attention of the appraising officers to the correct valuation of the merchandise, thereby affording them opportunity at the time of the appraisement and decision thereupon to affix the correct market value of the merchandise. Third, any rule which permits this provision of the statute to be extended to those cases not obviously made apparent by the papers to the eye of the appraiser and collector, and resting the case upon the possibility of proof *dehors* said record, must put a premium upon fraud or attempted frauds upon the revenues. It is contrary to our understanding of the word "manifest," as used in the common parlance, which requires something obvious or exposed to view.

And in *United States v. Wyman & Co.*, *supra*, we further said:

This statement of the importers' claim clearly shows that the disputed item, even if nondutiable in character, did not result from a manifest clerical error. The item in question was entered in the invoice in the words and figures intended by the writer; they were interpreted by the collector with the meaning and effect which were intended by the writer at the making of the invoice. This statement negatives the occurrence of a merely clerical error. The clerk who prepared the entry may have misunderstood the law relating to such items, he may have misunderstood the facts, or he may have entered the item inadvertently. Nevertheless, clerically the item was not incorrect, for it stood in the invoice in form and substance as the clerk intended to enter it, and the entry correctly carried the intended signification to the mind of the collector. In such case it can not be said that the item was a clerical error, much less can it be said that it was a manifest clerical error. For whatever inaccuracy existed in the entry was the result of inaccurate intention on the accountant's part and not of the clerical execution of that intention.

It would seem, therefore, that the doctrine of manifest clerical error has become *stare decisis*.

In the case at bar there may have been a clerical error by the author of the invoice in writing the figures representing the value of the whole of their purchase rather than the figures representing the cost of the white wool only. Such may have been a clerical error or it may have been an error of judgment. Whichever it may have been is, in view of the statutes and decisions recited, unimportant. It is insufficient in such cases that the error be merely a clerical one. It must also be a manifest clerical error—a clerical error which is manifest to the appraising officers or collector at the time of liquidation, or some time prior thereto, whereby it may be determined by the record at the time of liquidation that a clerical error has been made which is evidenced by the record. In this case there was nothing in the record to show the appraising officers or the collector that the error was caused by putting down an inaccurate price for the wool. That disclosure was evidenced and is established in this record solely by a deposition taken many months afterward in China. So that, admitting the error to have been a clerical one, it obviously was not

a manifest clerical error within the decisions and statutes quoted. It not being such, and there being no claims of shortage made, and both the entered and invoiced values of the importation being in excess of 12 cents per pound, we are unable to accord to the appellants any relief in this proceeding.

Affirmed.

SHALLUS v. UNITED STATES (No. 1258).¹

SUBSECTION 22 OF SECTION 28, TARIFF ACT OF 1909.

Part of the consignment of potatoes was condemned at the port of entry by the board of health as unfit for use. Certificates to this effect were made by the inspector May 24, 1912. On May 14, preceding, the importer had served notice that he made application to have the merchandise assorted. No other notice was given. The requirements of the statute as to notice are mandatory, and they were not complied with.—*Houlder v. United States* (4 Ct. Cust. Appls., 247; T. D. 33480); *Lauricella et al. v. United States* (4 Ct. Cust. Appls., 253; T. D. 33482).

United States Court of Customs Appeals, January 14, 1914.

APPEAL from Board of United States General Appraisers, Abstract 33291 (T. D. 33677).

[Affirmed.]

Spence Cheney for appellant.

William L. Wemple, Assistant Attorney General (*William A. Robertson*, special attorney, on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

DE VRIES, Judge, delivered the opinion of the court:

Frank H. Shallus during the month of May, 1912, imported at the port of Baltimore a quantity of potatoes. Upon the arrival of the importing vessel it was discovered that a part of the importation was so badly decayed as to be worthless. Two entries were made. As to entry 3203 the weigher duly certified that it consisted of 4,478 bags, of which 1,333 bags were condemned. As to entry 3173 the weigher duly certified that it consisted of 1,297 bags, of which 171 bags were condemned. The collector, however, took duty upon the net weight of the aggregate number of bags in each case. It appears from the record that in each case the condemned potatoes were by the health department of the city of Baltimore destroyed as unfit for use. Certificates to this effect in each case were made by the inspector May 24, 1912. On May 14, 1912, the importer served notice upon the collector of customs at that port that he made application under penalty bond "to assort the good from the bad and worthless potatoes, said assorting to be done under the supervision of customs officers," the importer to pay all charges. No other notice or writing was served upon the collector or appears to have entered into the case. The protest makes claim upon the grounds of condemnation and nonimportation or shortage. It

¹ Reported in T. D. 34101 (26 Treas. Dec., 104).

alleges that there was a shortage according to the weigher's returns as shown by the record. Protestant, however, did not serve upon the collector any notice other than that above set forth.

This court, in *Houlder v. United States* (4 Ct. Cust. Appls., 247; T. D. 33480) and in *Lauricella et al v. United States* (4 Ct. Cust. Appls., 253; T. D. 33482), construed subsection 22 of section 28 of the tariff act of 1909 according to subject matter. That subsection so construed as to shortage or nonimportation was read and may be quoted as follows:

SEC. 22. No allowance shall be made in the estimation and liquidation of duties for shortage or nonimportation caused by decay, destruction or injury to fruit or other perishable articles imported into the United States whereby their commercial value has been destroyed, unless under regulations prescribed by the Secretary of the Treasury. Proof to ascertain such destruction or nonimportation shall be lodged with the collector of customs of the port where such merchandise has been landed, or the person acting as such, within ten days after the landing of such merchandise. * * * Unless proof to ascertain the shortage or nonimportation of fruit or perishable goods shall have been lodged as herein required, * * * proof of such shortage or nonimportation shall not be deemed established and no allowance shall be made in the liquidation of duties chargeable thereon. * * * The provisions hereof shall apply whether or not the merchandise has been entered, and whether or not the duties have been paid or secured to be paid, and whether or not a permit of delivery has been granted to the owner or consignee.

As to condemnation the requirements of the statute were construed as follows:

Where imported fruit or perishable goods have been condemned at the port of original entry within ten days after landing by health officers or other legally constituted authorities, the importers or their agents shall, within twenty-four hours after such condemnation, lodge with the collector, or the person acting as collector of said port, notice thereof in writing, together with an invoice description and the quantity of the articles condemned, their location, and the name of the vessel in which imported. Upon receipt of said notice the collector, or person acting as collector, shall at once cause an investigation and a report to be made in writing by at least two customs officers touching the identity and quantity of fruit or perishable goods condemned, and * * * if the importer or his agent fails to notify the collector of such condemnation proceedings as herein provided * * * no allowance shall be made in the liquidation of duties chargeable thereon.

The Board of General Appraisers overruled the protest upon the grounds that the notices required by subsection 22 of section 28 were not in any case given. This appears to be true.

Under the *Houlder* case, *supra*, it is clear that potatoes would be regarded within the provisions of said subsection as perishable articles. That being the case, under the doctrine of the same decision, the importer must comply with the provisions of that subsection and can not rely upon protest alone under subsection 14 of the customs administrative act. It was held in that case by this court that the provisions of subsection 22 of section 28 as to fruits and other perishable articles were exclusive and the provisions thereof

must be complied with in order to recover in such cases. If protestant relies upon shortage or nonimportation the record fails to disclose that the protesting firm complied with the legal requirements by filing with the collector within 10 days after the landing of the merchandise proof of such shortage or nonimportation. Even were we to assume that the provisions of said subsection 22 as to shortage or nonimportation did not require that the proof of such shortage or nonimportation required by the statute should be made by the importer when there is before the collector such official returns of various customs officials which establishes this fact, and should we further assume that the two reports of the inspectors and the two reports from the surveyor's office of the weigher's returns constitute such evidence, there is not in the record, nevertheless, any showing or evidence that these proofs were before the collector within the statutory time. The statute is mandatory in that it requires that the proof to ascertain destruction or nonimportation in such cases shall be lodged with the collector within 10 days after the landing of the merchandise, and unless so lodged "no allowance shall be made in the liquidation of duties."

It appears that the goods arrived May 6, 1912; that they were entered May 7, 1912. The certificates by the inspector that the merchandise was destroyed, while dated May 24, 1912, do not state when, and there is no proof as to when the goods were condemned or when they were actually destroyed or consigned to the dump. So the certificates of the surveyor's office that the goods were condemned do not recite when the potatoes were condemned and these certificates bear date of July 3, 1912. So that were these documents held such "proof" they would be insufficient in time.

Not only is the record barren of any notice of condemnation made or filed within 24 hours thereafter, as required by the statute, but, on the contrary, the collector certifies that none such was filed. The notices which were filed by the importer, which do not appear as a matter of record but are set forth in importer's brief, were not sufficiently such as required by any of the provisions of the statute. Their language seems to be intended as a basis for a subsequent claim for "damage." They were not, however, sufficient in form or substance for such, nor do the other requirements of the statute as to damage seem to have been complied with.

While it is regrettable that importers should be compelled to pay duties upon goods not received into the commerce of the country, the provisions of the statute are mandatory in the protection of the revenues, and it is not within the power of this court or of the customs officials to waive compliance. It is the mandate of Congress in the interests and protection of the public revenues.

The decision of the Board of General Appraisers is *affirmed*.

LANGLEY *et al.* v. UNITED STATES (No. 1259).¹

ICE TANKS MADE OF CHINA OR EARTHENWARE.

Paragraph 92, tariff act of 1909, more specifically applies to this merchandise than paragraph 93, and the protest covers the claim under paragraph 92. The provision in paragraph 92 is for yellow earthenware "coated with white or transparent vitreous glaze." This covers all yellow earthenware coated with white or transparent vitreous glaze that has no other ornamentation or decoration than white or vitreous glaze, and this specifically describes the goods here.

United States Court of Customs Appeals, January 14, 1914.

APPEAL from Board of United States General Appraisers, Abstract 33311 (T. D. 33677), Abstract 33447 (T. D. 33709).

[Reversed.]

Curie, Smith & Maxwell (Thomas M. Lane of counsel) for appellants.

William L. Wemple, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, of counsel; *Henry H. Childers*, special attorney, on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

The merchandise involved in this case was described by the appraisers as so-called ice tanks made of china or earthenware, having a white glaze on the inside and a brown glaze on the outside. The appraisers held that these articles, on account of having the brown glaze, were subject to the provisions of paragraph 93, which prescribes a rate of 60 per cent ad valorem on all china, earthenware, etc., which is "painted, colored, tinted, stained, enameled, gilded, printed, or ornamented or decorated in any manner." The importers, protested the assessment, claiming the goods to be dutiable under paragraph 92, and produced evidence before the board which appears undisputed and which is supported by an examination of the samples introduced in evidence in the case, to the effect that the ice tanks in question were made of fire clay, yellow in color, and that it is yellow ware coated with white glaze on the inside and transparent vitreous glaze on the outside. The board overruled the importers' protest, basing its ruling on a previous decision in *Way's case*, G. A. 7009 (T. D. 30543) and upon *Frank v. United States* (2 Ct. Cust. Appls., 85; T. D. 31633). The decisions in question, as well as the one here under consideration, were rested upon paragraph 93 of the tariff act of 1909, and in neither of the cases cited was paragraph 92 under consideration. It remains, therefore, for us to determine whether the importation in question is to be differentiated from those there under consideration, and whether it falls within the terms of paragraph 92, as claimed by the importer.

It is doubtless true that in the absence of more specific provision these articles would fall within paragraph 93 as crockery ware, enameled. But the question remains as to whether the provision of paragraph 92 is more specific. It was said in the opinion in this case

¹ Reported in T. D. 34102 (26 Treas. Dec., 107).

that the only claim urged by the attorney for the importers was under paragraph 95 for articles and wares composed in chief value of earthy or mineral substances. This the importers' counsel claims was an error. The record, however, does not show precisely what was urged before the board in the brief, but the protest clearly covers the claim here made under paragraph 92.

We turn then to paragraph 92 to see what is provided. This paragraph reads as follows:

92. Common yellow, brown, or gray earthenware, plain, embossed, or salt-glazed common stoneware, and earthenware or stoneware crucibles, all the foregoing not decorated in any manner, twenty-five per centum ad valorem; yellow earthenware, plain or embossed, coated with white or transparent vitreous glaze but not otherwise ornamented or decorated, and Rockingham earthenware, forty per centum ad valorem.

The precise contention is that the provision for earthenware "coated with white or transparent vitreous glaze" is more specific than the provision for earthenware, enameled. We think this contention should be sustained. The article here involved comes precisely within the narrow term "yellow earthenware * * * coated with white or transparent vitreous glaze but not otherwise ornamented or decorated." This plainly covers all yellow earthenware coated with white or transparent vitreous glaze which has no other ornamentation or decoration than white or transparent vitreous glaze. One or both may be present, white or transparent vitreous glaze, but no other or further ornamentation or decoration is permissible. It would be difficult to conceive of a more specific description of the article here involved than is furnished by the language above quoted, as thus interpreted. It is more specific than a general provision for enameled ware.

The decision of the board is reversed, and the claim of the importers under paragraph 92 is *sustained*.

UNITED STATES v. MASSON (No. 1280).¹

SAFETY MATCHES AND WIND MATCHES.

The matches of the importation called "Wind Flamers" come within the definition of "fancy" matches as fixed by this court. *United Cigar Stores Co. et al. v. United States* (4 Ct. Cust. Appls., 66; T. D. 33311). The friction safety matches of the importation are not "fancy" matches.

United States Court of Customs Appeals, January 14, 1914.

APPEAL from Board of United States General Appraisers, Abstract 33553 (T. D. 33738).

[Modified.]

William L. Wemple, Assistant Attorney General (*Leland N. Wood*, special attorney, on the brief), for the United States.

Submitted on record by appellee.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

DE VRIES, Judge, delivered the opinion of the court:

The invoices affected by this appeal cover a variety of matches. The different classes are indicated and distinguished by case num-

¹ Reported in T. D. 34103 (26 Treas. Dec., 109).

bers and other data upon the invoices. The bulk of the importation was passed as entered, and the protest and this appeal concern so-called "Flamers" or "wind matches" and some of the so-called "safety matches," all of which were classified as "fancy matches" and rated for duty at 35 per centum ad valorem by the collector of customs at the port of Philadelphia under the provisions of paragraph 436 of the tariff act of 1909, which provides:

436. Matches, friction or lucifer, of all descriptions, per gross of one hundred and forty-four boxes, containing not more than one hundred matches per box, six cents per gross; when imported otherwise than in boxes containing not more than one hundred matches each, three-fourths of one cent per one thousand matches; wax and fancy matches and tapers, thirty-five per centum ad valorem.

The importer made claim that these articles were properly dutiable at 6 cents per gross of 144 boxes containing not more than 100 matches per box under the same paragraph. The Board of General Appraisers sustained the importer and the Government appeals. The collector made return as to the subject matter of the appeal that the matches consisted of "certain matches, with colored sticks, and wind-matches * * *." The decision of the Board of General Appraisers is brief and recites: "The appraiser's special report on these protests states that the merchandise in question consists of 'fancy matches' * * *." The board then cites the decision of this court in *United Cigar Stores Co. et al. v. United States* (4 Ct. Cust. A ls, 66: T. D. 33311), stating that therein "it was held that such matches were dutiable at the rate of 6 cents per gross boxes under the provisions of paragraph 436 and in harmony therewith that claim is sustained."

Obviously the decision of this court in *United Cigar Stores Co. et al. v. United States*, *supra*, was inaccurately interpreted. The matches the subject of that decision as defined therein were as follows:

The importation consists of matches made of thin flat sticks tipped with some ignitable composition colored yellow. The wood from which these matches are made is first cut into flakes about 2 inches long, an inch wide, and one-sixteenth of an inch thick. Each flake is stained red and cut into 12 pointed splints joined together at the bottom by a common wooden base from which they have not been completely severed. After tipping the splints the flakes are made up in pairs and pasted to a paper folder or wrapper in such a way that they may be conveniently carried in the vest pocket and the splints readily broken off one at a time as required. The folder or wrapper is provided with the specially prepared striking surface required for the ignition of the safety match, and is so designed that it serves the double purpose of protecting the matches from injury and of advertising various kinds of goods.

The court laid down a rule therein, it being claimed by the Government that that importation was of fancy matches, for the determination of what is and what is not a fancy match, as follows:

In common parlance a fancy article is one which is out of the ordinary, that is to say, one which has some special quality, virtue, or value not found in the article commonly used and not required by the use to which the ordinary article is commonly put; or it may be something which pleases not so much because of the qualities which make it useful as because of characteristics which appeal to the taste and to the fancy. "Fancy" is the antonym of "plain," "common," "ordinary," "staple," and to say that a thing is fancy necessarily implies that it has a value or characteristics not found

in the articles of similar type. There is nothing esthetic or fanciful about the goods in controversy, and in them is no quality or virtue which is not found in the ordinary safety match in general use. They are flimsy safety matches and beyond the fact that they are small, ordinarily cost nothing to the consumer, lie flat in the package, and may be conveniently carried, there is nothing about them which would recommend them to the consumer. Far from having any special value, they are an inferior grade of match, which is not sold but given away to smokers and which is not worth half as much as a good lucifer match. The fact that the sticks or stems of the matches are stained and that they are presented to the consumer in booklets can not be regarded as giving a character to the goods which would justify their designation as fancy matches. Indeed, that principle was recognized by the board itself in the Sheldon case, when it held that better matches with stained sticks put up in boxes and better matches with plain sticks put up in booklets were not fancy matches. Stained or unstained the matches are sold to the dealer for the same price and their transformation into a fancy match can not be effected by putting them up in a booklet, which advertises many kinds of goods, rather than in a box, which advertises matches only. The manner of putting up the matches might possibly give them the character of a novelty, but certainly by itself it would not be sufficient to make out of them a fancy article.

The matches included upon these invoices as "Wind Flamers" are not of the classes included within the decision in question. They are, however, within the definition of fancy matches as therein expressed and defined by the court. The matches included upon these invoices, however, which are merely safety matches with colored sticks, "(11/12 sizes, red sticks, yellow tips)" are not within the definition of fancy matches as laid down by the court in that case. They are more like those the subject of decision in the case, and which as such were held properly dutiable as claimed by the importer in this case. The decision of the board as to this class of merchandise should be affirmed. The decision of the board as to the classes of merchandise designated upon the invoices as "Wind Flamers" should be reversed. Inasmuch as the goods can be segregated by an examination of the invoices the decision is therefore in the particulars stated *modified*.

UNITED STATES v. NIGHTINGALE (No. 1287).¹

ROUGH CUT POLES, WHEN SPLIT AND SHAVED, FOR MAKING BARREL HOOPS.

It was clearly intended in paragraph 712, tariff act of 1909, to include in the phrase "round, unmanufactured timber" something other than logs; that timber should not have there a restricted, limited meaning. Articles *ejusdem generis* with those specifically named are included, and the importation accordingly was entitled to free entry.

United States Court of Customs Appeals, January 14, 1914.

APPEAL from Board of United States General Appraisers, Abstract 33762 (T. D. 33778).

[Affirmed.]

William L. Wemple, Assistant Attorney General (Leland N. Wood, special attorney, on the brief), for the United States.

Submitted on record by appellee.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

This is an appeal from a decision of the Board of General Appraisers reversing an assessment of duty upon certain merchandise

¹ Reported in T. D. 34104 (26 Treas. Dec., 111).

consisting of 19,000 hoop poles, which were assessed for duty at 20 per cent ad valorem under paragraph 203 of the act of 1909. Paragraph 203 imposes a duty of 15 per cent on—

Sawed boards, planks, deals, and all forms of sawed cedar, * * * and all other cabinet woods, * * * veneers of wood, and wood unmanufactured, not specially provided for in this section, twenty per centum ad valorem.

The claim of the protest was sustained by the board for entry under paragraph 712, which exempts from duty—

Wood: Logs and round unmanufactured timber, including pulp woods, firewood, handle bolts, shingle bolts, gun blocks for gun stocks rough hewn or sawed or planed on one side, hop poles, ship timber, and ship planking; all the foregoing not specially provided for in this section.

The report of the appraiser was that the hoop poles in question were rough cut poles, which, when they have been split and shaved, are made into barrel hoops. It is contended by the Government that these poles are not, in the language of common speech, logs or round unmanufactured timber, and certain dictionary definitions are cited as to the meaning of the words "log" and "timber," and the case is cited of *United States v. Knipscher* (152 Fed., 590), which held that certain driers' sticks about 1 inch in diameter were more properly classified as wood unmanufactured than as manufactures of wood. In that case, however, no claim was made of free entry, and that question was not discussed by the court.

No one would claim that these hoop poles are logs. If free they are free under the provision for round unmanufactured timber, and it becomes necessary to determine the sense in which that phrase is used in the clause in question.

The word "timber" is defined in the *Century Dictionary* as—

Wood suitable for building houses or ships or for use in carpentry, joinery, etc.; trees cut down and squared and cut into beams, rafters, planes, boards, etc.

The word has had judicial interpretation. In *United States v. Stores* (14 Fed., 824), Locke, District Judge, in charging the jury, said:

The term "timber," as used in commerce, refers generally only to large sticks of wood, squared or capable of being squared for building houses or vessels; and certain trees only having been formerly used for such purposes, namely, the oak, the ash, and the elm, they alone were recognized as timber trees; but the numerous uses to which wood has come to be applied, and the general employment of all kinds of trees for some valuable purpose has wrought a change in the general acceptance of terms in connection therewith, and we find that Webster defines "timber" to be "that sort of wood which is proper for buildings or for tools, utensils, furniture, carriages, fences, ships, and the like." This would include all sorts of wood from which any useful articles may be made or which may be used to advantage in any class of manufacture or construction.

With so many peculiar significations, the intended meaning of the word usually depends upon the connection in which it is used or the character of the party making use of it.

In the case of *Bearce v. Dudley* (88 Me., 410, 417), the question involved was whether pulp wood was timber within the meaning of a statute giving a lien to log owners for timber so intermixed with logs that it could not be conveniently separated. The court, in an extended opinion, quotes at some length from the case of *United States v. Stores*, *supra*, and concludes the discussion as follows:

The trend of all the authorities is to construe the word "timber," in a statute like the one under consideration, comprehensive enough to work the purposes of the enactment. The purpose of this statute was to give those using the waters of the State to float the wood product of our forests, suited for manufacture, to market, equal rights and a convenient remedy under circumstances and conditions, where the common-law remedy was inadequate, and compass a result in furtherance of the interests of all concerned. * * * The benefits of it are equally useful whether the drives be of saw logs, ship timber, pulp wood, or any other wood product suitable for commerce or manufacture that may be conveniently driven to market; and whoever incumbers our rivers with material of this sort for the purpose of floating it to market ought to come within the provisions of this statute, and the legislature must have intended that they should. It could not have intended the legislation for some classes and not for all. It is remedial and must be most liberally construed when necessary to work out the purpose of the legislation.

See also *Donworth v. Sawyer* (94 Me., 242, at 252).

Applying the rules laid down in the cases cited, we think there is little difficulty in construing paragraph 712. It was clearly intended to include in the phrase "round, unmanufactured timber" something other than logs. The word "logs" is sufficient unto itself, and requires no interpretation. The succeeding phrase, therefore, should be construed as language of extension, intended to include some kind of unmanufactured timber which would not fall under the designation of logs, and which, if they stood by themselves, would indicate any useful timber in the round, unmanufactured state. But to make still more clear the fact that such was the use intended, the language is followed by the further provision "including pulp woods, firewood, handle bolts, shingle bolts, gun blocks for gunstocks rough hewn or sawed or planed on one side, hop poles, ship timber." etc., making it perfectly evident that the restricted or limited meaning of the word "timber" was not that intended by the Congress, but that it was used in its broader and more comprehensive sense and one which would include such a product as that in question. The word "including," followed by the enumeration of specific articles, indicates that in the use of the preceding term "round, unmanufactured timber," it was intended to include at least articles *ejusdem generis* with those specifically named. For an illustration of the extending effect of associated words, see Endlich on Interpretation of Statutes (sec. 404). It would be a very strained construction that would distinguish between hop poles, which are in terms declared to be round, unmanufactured timber, and hoop poles, which would

just as clearly fall within the designation of round, unmanufactured timber.

We think the Board of General Appraisers reached the correct conclusion in this case, and the decision is *affirmed*.

UNITED STATES *v.* EDSON KEITH & Co. (No. 946).¹

1. BURDEN OF PROOF.

The burden of proof never shifts, but here the importer had sustained that burden *prima facie*, proving his case by a preponderance of evidence, and the Government was thereby called to offset that evidence by proof of equal weight tending either to sustain the collector's action or to prove the goods were not dutiable as claimed.

2. MANUFACTURES IN PART OF METAL.

Although the provisions for manufactures in chief value of cotton or silk are more specific than the provision for articles in part of metal, the goods here fell within the metal paragraph (paragraph 193, tariff act of 1897), according to the weight of the evidence.

United States Court of Customs Appeals, January 22, 1914.

APPEAL from Board of United States General Appraisers, Abstract 28964 (T. D. 32655).

[Affirmed.]

William L. Wemple, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, on the brief), for the United States.

Lester C. Childs for appellees.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

SMITH, Judge, delivered the opinion of the court:

This case involves the classification of wreaths, clusters, sprays, bouquets, aigrettes, pompons, and artificial plants, made of artificial leaves, fruits, flowers, and grasses, branched or bound together by wire. The merchandise was classified by the collector of customs as artificial leaves, fruits, and flowers, dutiable at 50 per cent *ad valorem* under the provisions of that paragraph of the tariff act of 1897 which in part reads as follows:

425. * * * Artificial or ornamental feathers, fruits, grains, leaves, flowers, and stems or parts thereof, of whatever material composed, not specially provided for in this Act, fifty per centum *ad valorem*.

The importers claimed that the goods were manufactures in part of metal and therefore dutiable at 45 per cent *ad valorem* under the provisions of paragraph 193 of said act, which is as follows:

193. Articles or wares not specially provided for in this Act, composed wholly or in part of iron, steel, lead, copper, nickel, pewter, zinc, gold, silver, platinum, aluminum or other metal, and whether partly or wholly manufactured, forty-five per centum *ad valorem*.

The Board of General Appraisers sustained the protest. On appeal from that decision this court held, first, that the goods were not arti-

¹ Reported in T. D. 34128 (26 Treas. Dec., 143).

ficial leaves, fruits, or flowers, but manufactures of such wares and wire, and having a name and a use so distinct and different from that of their components as to take them out of the category of artificial leaves, fruits, and flowers; second, that the constituents of the wreaths, clusters, sprays, bouquets, aigrettes, pompons, and artificial plants were not silk and cotton and wire, but artificial leaves, fruits, flowers, and wire, and that as there was no provision for articles composed of artificial leaves, fruits, or flowers the goods were dutiable as wares composed in part of metal.

On February 11, 1913, a rehearing was granted, and on that rehearing it was insisted by the Government that if the merchandise could not be classified as artificial or ornamental fruits, grains, leaves, or flowers they should be classified as manufactures in chief value of cotton or silk. When it came to the consideration of this point, however, it was found that there was no evidence from which we could determine whether silk, wire, or cotton was the component of chief value. A reargument was therefore ordered by the court on its own motion and discussion invited as to whether the burden of proof rested on the Government of establishing that the goods were in chief value of silk or cotton. If the Government was bound to show that the merchandise was made in chief value of silk or cotton, and therefore not dutiable under the metal paragraph as claimed by the importers, it failed to meet that burden and the decision of the board should be affirmed.

The Government contends, and correctly, that the burden of proof was on the importers all the way through the case to show that the collector was wrong and that he was right. As a corollary to that proposition it follows that unless the importers produced some evidence substantiating *prima facie* the correctness of his claim, no duty was imposed on the Government to sustain the correctness of the collector's classification or to make proof that the importers were wrong.

The burden of proof—that is to say, the obligation imposed by law on a litigant of establishing a fact by evidence—never shifts; but the duty of meeting or overcoming evidence in favor of or against any given contention may shift from one side to the other during the progress of the trial, according as the nature and weight of the proofs tend to support or controvert the fact or facts, the ascertainment of which is necessary for the proper judicial determination of the case. *Central Bridge Corporation v. Butler* (2 Gray, 68 Mass., 130-132); *Scott v. Wood* (81 Cal., 398, 400-402).

With this principle laid down, the question in the present controversy, as we see it, is not whether the importers were charged with the burden of proof, but whether they met their obligations by introducing credible, material, and competent evidence which showed, at least *prima facie*, that the collector's classification was incorrect and that the goods were dutiable under the paragraph claimed in the protest.

If they did, then at the very least it was incumbent on the Government to offset that evidence by proof of equal weight tending either to sustain the collector's action or to prove that the goods were not dutiable under the paragraph claimed in the protest. The importers were not bound to make out their case to a moral certainty and beyond a reasonable doubt. To put the Government to its proofs, it was sufficient for the importers to show *prima facie* that their classification was correct and that the collector's classification was wrong, and once that was done the burden of proceeding shifted to the Government—not because the burden of proof had shifted, but because *prima facie* the importers had sustained that burden and proved their case by a preponderance of evidence. McKelvey on Evidence (2d ed., p. 66 *et seq.*); *Powers v. Russell* (13 Pick., Mass., 69, 76–77).

Here the testimony introduced by the importers established, first, that the wares were not artificial leaves, fruits, or flowers, but articles made out of such wares, entitled to a new name and adapted to uses for which the original leaves, flowers, and fruits were not suitable; and from that it followed that the goods were new manufactures not provided for in paragraph 425 and consequently not dutiable as assessed; second, that the articles in controversy were composed in part of metal and therefore *prima facie* dutiable under paragraph 193 of the act of 1897, as claimed in the protest. This evidence was not contradicted by the Government. The board gave it full faith and credit, and the weight to which it was entitled when produced and submitted to the trial tribunal can not now be denied to it on the surmise that cotton or silk may be the component of chief value, a surmise, by the way, predicated on no evidence and fairly deducible from none of the facts in the case.

True, when the importers proved that the goods were in part of metal they at the same time proved that they were in part of silk and cotton, but that did not show that the articles were in *chief value* of silk or cotton and therefore dutiable as manufactures in chief value of silk or cotton and not as articles in part of metal. Of course, if the collector had assessed the goods as articles composed in chief value of cotton or silk, proof that they were in part of metal would be entirely consistent with the presumption that they were in chief value of cotton or silk and therefore entirely consistent with the presumption that the goods were dutiable as assessed. But that is not this case. The goods were not classified as articles composed in chief value of cotton or silk and there was neither presumption nor evidence of any kind that the merchandise was of that character. There was evidence that it was of the character claimed by the importers. Consequently, although the provisions for manufactures in chief value of cotton or silk are more specific than the provision for articles in part of metal, the goods here in controversy must be

classified under the metal paragraph in accordance with the weight of the evidence, there being no evidence showing or tending to show that they are in chief value of silk or cotton.

The protest as to single leaves and single flowers was abandoned by the importers upon the hearing, and as to such single leaves and flowers this decision does not apply.

The decision of the Board of General Appraisers is *affirmed*.

LANG *et al.* v. UNITED STATES (No. 1106).¹

1. PALM LEAVES, BLEACHED AND DYED.

The legislative history of paragraphs 251, tariff act of 1897, and 263, tariff act of 1909, shows there was no intention to make the term "palms" cover palm leaves, preserved. These articles of the importation are ornamental leaves within the meaning of paragraph 438, and therefore dutiable as assessed.

2. NATURAL GRASSES, DYED AND PREPARED.

These ornamental grasses serve the same purposes as the ornamental grains and leaves enumerated in paragraph 481, and they are dutiable thereunder by similitude.

3. AIGRETTES OF DYED AND PREPARED GRAINS AND GRASSES.

So far as appears from the record and the samples in evidence these aigrettes are manufactures of metal, and therefore dutiable under the provisions of paragraph 199.

United States Court of Customs Appeals, January 22, 1914.

APPEAL from Board of United States General Appraisers, Abstracts 30906 and 30949 (T. D. 33055).

[Reversed as to part and affirmed as to part.]

Comstock & Washburn (J. Stuart Tompkins on the brief) for appellants.

William L. Wemple, Assistant Attorney General (*Leland N. Wood*, special attorney, on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

SMITH, Judge, delivered the opinion of the court:

Grains, grasses, grasses made up into aigrettes for women's hats, and palm, fern, and beech leaves, imported at the ports of Chicago, Philadelphia, and New York under the tariff acts of 1897 and 1909, were classified by the several collectors of customs as ornamental natural grains, grasses, and leaves, and were assessed for duty, according to date of importation, either at 50 per cent ad valorem under paragraph 425 of the act of 1897 or at 60 per cent ad valorem under paragraph 438 of the act of 1909. The paragraphs under which the collectors classified the goods and assessed them for duty, in so far as pertinent to the issue here involved, are as follows:

1897.

425. * * * Artificial or ornamental feathers, fruits, grains, leaves, flowers, and stems or parts thereof, of whatever material composed, not specially provided for in this Act, fifty per centum ad valorem.

¹ Reported in T. D. 34129 (26 Treas. Dec., 146).

1909.

438. * * * Artificial or ornamental feathers, fruits, grains, leaves, flowers, and stems or parts thereof, of whatever material composed, not specially provided for in this section, sixty per centum ad valorem; boas, boutonnieres, wreaths, and all articles not specially provided for in this section, composed wholly or in chief value of any of the feathers, flowers, leaves, or other materials or articles herein mentioned, sixty per centum ad valorem.

The importers protested, first, that the grains, grasses, aigrettes, and fern and beech leaves imported subsequent to August 5, 1909, were either entitled to free entry as grasses, fibers, or fibrous vegetable substances under paragraph 578, or as crude unmanufactured vegetable substances under paragraph 630, or dutiable as manufactures of chip or grass under paragraph 463, or as nonenumerated manufactured articles under paragraph 480; second, that the palm leaves were palms, preserved, and therefore dutiable at 25 per cent ad valorem either under paragraph 251 of the act of 1897 or under paragraph 263 of the act of 1909, as the date of importation might determine.

The Board of General Appraisers overruled the protests, and the importers appealed.

In their brief on appeal the appellants waive their claims as to the fern leaves and beech leaves, but insist that the importers' protests as to the grains, grasses, aigrettes, and palm leaves should be sustained.

From the testimony adduced by the importers at the hearing and the samples in evidence it appears that the palms and palm leaves referred to in the protests are leaves of the cycas, coco, and areca palm. These leaves are first bleached and then dyed to their natural color, which process serves not only to give a natural appearance to the leaves, but also preserves them from decay. The importers contend that the palm leaves are palms preserved and therefore dutiable, according to date of importation, either under paragraph 251 of the tariff act of 1897 or under paragraph 263 of the tariff act of 1909, which read as follows:

1897.

251. Orchids, palms, dracenas, crotons and azaleas, tulips, hyacinths, narcissi, jonquils, lilies, lilies of the valley, and all other bulbs, bulbous roots, or corms, which are cultivated for their flowers, and natural flowers of all kinds, preserved or fresh, suitable for decorative purposes, twenty-five per centum ad valorem.

1909.

263. Orchids, palms, azaleas, and all other decorative or greenhouse plants and cut flowers, preserved or fresh, twenty-five per centum ad valorem; lily of the valley pips, tulip, narcissus, begonia, and gloxinia bulbs, one dollar per thousand; hyacinth, astilbe, dielytra, and lily of the valley clumps, two dollars and fifty cents per thousand; lily bulbs and calla bulbs, five dollars per thousand; peony, Iris Kämpferii or Germanica, canna, dahlia, and amaryllis bulbs, ten dollars per thousand; all other bulbs, bulbous roots or corms which are cultivated for their flowers or foliage, fifty cents per thousand.

We think that the importers' contention is unsound. In our opinion, duty is imposed by both paragraphs on palm plants in their natural state and not on palm leaves or on palms which have lost

their vitality and are artificially preserved. In this view we are confirmed by the legislative history of the paragraphs in question and by the interpretation given to the word "palms" as it appeared in the tariff acts of 1894 and 1897. Paragraph 234½ of the act of 1894 took "orchids, lily of the valley, azaleas, *palms*, and other plants, used for forcing under glass for cut flowers or decorative purposes" from the free list and subjected them to a duty of 10 per cent ad valorem, and that provision was held by the board to embrace living plants and not dyed or painted palm leaves which had lost their vitality. *In re Sheldon & Co.* (T. D. 16970). Paragraph 251 of the act of 1897 amended paragraph 234½ of the act of 1894 by providing separately for plants, for bulbs, bulbous roots cultivated for their flowers, and for natural flowers, preserved or fresh. No language was used, however, in the amended provision showing any intention whatever to include palm leaves within the designation of palms, and the board so decided on the protest of G. W. Sheldon & Co. (T. D. 21625).

Paragraph 263 of the act of 1909 changed paragraph 251 of the act of 1897 only to the extent of providing for additional bulbous roots, varying the order of enumeration, and substituting cut for natural flowers. Palms, azaleas, and all other decorative plants were grouped, it is true, in paragraph 263 with cut flowers, preserved or fresh. From that fact alone, however, it can scarcely be concluded that Congress intended to lay a duty on palms, preserved; that is to say, on palms which had ceased to be plants. By every rule of grammatical construction the words "preserved or fresh" relate to cut flowers, not to palms, and any change accomplished by paragraph 263 of the tariff act of 1909 in the order of enumeration as it existed in paragraph 251 of the tariff act of 1897 must be ascribed to a desire to bring together in the same subdivision all items subject to the same kind and rate of duty, and not to an intention to make the term "palms" cover palm leaves, preserved. In our opinion, the palm leaves which are here the subject of controversy are ornamental leaves within the meaning of paragraph 438 and therefore dutiable as assessed. *Bayersdorfer v. United States* (171 Fed., 286); *United States v. Bayersdorfer* (175 Fed., 959).

No testimony was introduced as to the nature and character of the grains and grasses made the subject of protest, and for the facts determinative of their classification we are remanded to the report of the appraiser. From that report it appears that the grasses referred to in the protests consisted of "natural grasses dyed and prepared, suitable and used for ornamental purposes." The importers argue that grasses dyed and prepared are either manufactures of grass, dutiable under paragraph 463, or nonenumerated articles manufactured in whole or in part, dutiable under paragraph 480 of the act of 1909. Paragraphs 463 and 480 are as follows:

463. Manufactures of bone, chip, grass, horn, quills, india rubber, palm leaf, straw, weeds, or whalebone, or of which these substances or any of them is the component

material of chief value, not specially provided for in this section, thirty-five per centum ad valorem; but the terms "grass" and "straw" shall be understood to mean these substances in their natural form and structure, and not the separated fiber thereof; sponges made of rubber, forty per centum ad valorem; combs, composed wholly of horn, or composed of horn and metal, fifty per centum ad valorem.

480. That there shall be levied, collected, and paid on the importation of all raw or unmanufactured articles, not enumerated or provided for in this section, a duty of ten per centum ad valorem, and on all articles manufactured, in whole or in part, not provided for in this section, a duty of twenty per centum ad valorem.

It may be that the grasses in this case have been so dyed and prepared that they constitute a new article and are fitted for a use for which undyed and unprepared grasses would not be suitable, and that they are therefore manufactures of grasses. If such be the fact, however, the burden was on the importers to show it by competent evidence, and having failed to do so we must hold that the dyed and prepared grasses here involved are not manufactures of grass and therefore not dutiable under paragraph 463 as claimed in the protest. It is true, as contended by the importers, that ornamental grasses and grasses designed for ornamental purposes do not fall within the designation of ornamental grains and leaves as those terms are commonly used and that such grasses are not specifically provided for by the paragraph under which they were assessed for duty by the collector. Such ornamental grasses, however, serve the same purposes and are put to the same uses as the ornamental grains and leaves enumerated in that paragraph, and we think they are dutiable thereunder by similitude in accordance with the provisions of paragraph 481, in as much as that paragraph must be first applied before recourse is had to the provisions of paragraph 480 for articles manufactured in whole or in part and not provided for. *Hahn v. United States* (100 Fed., 635); *Ross v. Peaslee* (20 Fed. Cas., 1241-1242); *Vandiver v. United States* (2 Ct. Cust. Appls., 505-507; T. D. 32246).

As appears from the report of the appraisers, the aigrettes mentioned in the protest of Theo. Ascher & Co. are manufactured from dyed and prepared grains and grasses and are used for trimming ladies' hats. An inspection of the aigrettes, a sample of which was introduced in evidence at the hearing, discloses that they are composed of grasses, paper, and wire, but which of these constituents is the component of chief value was not established by the importers. Indeed, so far as appears from the record, no evidence at all was introduced on that subject. The aigrettes can not, therefore, be classified as manufactures wholly or in chief value of grass under paragraph 463 of the act of 1909, as claimed in the protests. So far as appears from the record and samples in evidence the aigrettes are manufactures in part of metal and therefore dutiable under the provisions of paragraph 199, which reads as follows:

199. Articles or wares not specially provided for in this section, composed wholly or in part of iron, steel, lead, copper, nickel, pewter, zinc, gold, silver, platinum, aluminum, or other metal, and whether partly or wholly manufactured, forty-five per centum ad valorem.

The cigarettes were claimed by Ascher & Co. to be dutiable under paragraph 199, and as to them the decision of the Board of General Appraisers is therefore *reversed*. In all other particulars the board's decision is *affirmed*.

LEVY & LEVIS CO. v. UNITED STATES (No. 1170).¹

RIPE CHERRIES.

The provision in paragraph 274, tariff act of 1909, for cherries, green or ripe, and for edible fruits, dried, is more specific than the free-entry provision for all fruits, green, ripe, or dried. The evidence, moreover, shows the importation to be ripe cherries, but clearly not dried, and they are accordingly dutiable under the paragraph named as ripe cherries.

United States Court of Customs Appeals, January 22, 1914.

APPEAL from Board of United States General Appraisers, Abstract 31849 (T. D. 33304)

[Reversed.]

Comstock & Washburn (J. Stuart Tompkins on the brief) for appellants.

William L. Wemple, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, of counsel; *Samuel Isenschmid*, special attorney, on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

SMITH, Judge, delivered the opinion of the court:

One hundred barrels or 307 bushels of Dalmatian cherries imported at the port of New York were classified by the collector of customs as edible dried fruits and assessed for duty at 2 cents per pound under that clause of paragraph 274 of the tariff act of 1909 which reads as follows:

274. * * * All edible fruits, including berries, when dried, desiccated, evaporated, or prepared in any manner, not specially provided for in this section, two cents per pound; * * *.

The importers protested that the cherries were either free of duty as fruits, green, ripe, or dried, under paragraph 571 or dutiable at 25 cents per bushel as cherries, green or ripe, under the first clause of paragraph 274. Paragraph 571 and the first clause of paragraph 274 are as follows:

(Free List.) 571. Fruits or berries, green, ripe, or dried, and fruits in brine, not specially provided for in this section.

274. Apples, peaches, quinces, cherries, plums, and pears, green or ripe, twenty-five cents per bushel; * * *.

The Board of General Appraisers overruled the protest, and the importers appealed.

¹ Reported in T. D. 34180 (26 Treas. Dec., 150).

Cherries are fruits and are therefore within the language of paragraph 571. Nevertheless, they can not be admitted to free entry under the provisions of that paragraph, as claimed in the protest, if they have been subjected to duty by some more specific provision of the tariff act. Cherries, green or ripe, are provided for by the first clause of paragraph 274 and made dutiable at the rate of 25 cents per bushel. If the cherries be dried, they fall within the designation of edible fruits, dried, and are subjected by the same paragraph to a duty of 2 cents per pound. Cherries and edible fruits are kinds or classes of fruits and consequently the provisions imposing a duty on cherries, green or ripe, and on edible fruits, dried, are clearly much narrower in scope than the free-entry provision, which is broad enough to embrace all fruits, green, ripe, or dried, and whether edible or not. *United States v. Wing Wo Chong* (98 Fed., 602, 603). From this it follows that the merchandise is more specifically provided for under paragraph 274 than under paragraph 571 of the free list and that the cherries are not entitled to admission free of duty.

But one question remains to be determined, and that is, Do the cherries fall within the designation of edible fruits, dried, or may they be better classified as "cherries, * * * green or ripe?" From the evidence adduced at the hearing we are satisfied that these cherries are not edible fruits, dried, within the common ordinary meaning of that designation. Fruits, in order that they may be considered as dried, must be brought to such a condition that they may be properly described as no longer in the juice. Fruits which still retain an appreciable quantity of the watery component natural to them are commonly recognized as fresh fruits, and until their liquid constituent has been evaporated and the fluidity characteristic of their fruit juices has been removed, such fruits can not properly be regarded as dried fruits. The testimony in this case shows without contradiction that the Dalmatian cherries which are the subject of controversy are not plucked when ripe, but are allowed to remain on the tree until they become overripe and shrivel or shrink. The cherries are then gathered and are still so "wet" and contain so much of the natural juices that moisture exudes from them in such quantities as to discolor the barrels in which they are packed. The witnesses who import them are agreed that the cherries are simply overripe fruit, and that in the trade they are not bought and sold as dried cherries.

In our opinion, fruits which have been permitted to become overripe, but which still contain so much of the natural juices that the exudation of the juices causes the goods to become "wet" and the barrels containing them discolored are not dried fruits, as that term is popularly understood. Certainly a fruit as juicy as that is not of the class of dried fruits typified by prunes, raisins, dried apples, dried peaches, dried currants, and the like.

The goods are, in our opinion, ripe cherries and are therefore dutiable at 25 cents per bushel under the first clause of paragraph 274.

The decision of the Board of General Appraisers is *reversed*.

MICHELIN TIRE CO. v. UNITED STATES (No. 1172).¹

LEATHER BELTS FOR MAKING AUTOMOBILE TREADS.

The leather strips here had been given a form and a size specially and definitely adapting them for conversion into automobile treads of different lengths and widths, and they were dutiable as assessed at 15 per cent ad valorem under paragraph 451, tariff act of 1909.

United States Court of Customs Appeals, January 22, 1914.

APPEAL from Board of United States General Appraisers, Abstract 31884 (T. D. 33325).

[Affirmed.]

Coudert Bros. (John P. Murray on the brief) for appellant.

William L. Wemple, Assistant Attorney General (*Charles D. Lawrence*, special attorney, on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

SMITH, Judge, delivered the opinion of the court:

Leather strips from 2 to 7 feet long and from about 3½ to about 5½ inches wide were classified by the collector of customs at the port of New York as "skins dressed and finished and cut into forms suitable for use as belts." The merchandise was accordingly subjected to the duty of 15 per cent ad valorem imposed by paragraph 451 on leather not specially provided for and to the additional duty of 10 per cent ad valorem specified in the proviso to that paragraph for leather cut into forms suitable for conversion into manufactured articles. The pertinent parts of the paragraph under which the merchandise was classified and assessed for duty are as follows:

451. Band, bend, or belting leather, rough leather, and sole leather, five per centum ad valorem; dressed upper and all other leather, calfskins tanned or tanned and dressed, kangaroo, sheep and goat skins (including lamb and kid skins) dressed and finished, other skins and bookbinders' calfskins, all the foregoing not specially provided for in this section, fifteen per centum ad valorem; * * *: *Provided*, That leather cut into shoe uppers or vamps or other forms, suitable for conversion into manufactured articles, * * * shall pay a duty of ten per centum ad valorem in addition to the duty imposed by this paragraph on leather of the same character as that from which they are cut.

To the classification and assessment of duty made by the collector protests were entered by the importer. One of these protests made the claim that the leather was dutiable as band or belting leather at 5 per cent ad valorem under the first clause of paragraph 451. The others claimed that the merchandise was dutiable either under that clause or dutiable at only 10 per cent ad valorem as provided by the proviso to the paragraph.

¹ Reported in T. D. 34131 (26 Treas. Dec., 152).

The Board of General Appraisers found that the merchandise was belting leather cut into forms suitable for the manufacture of automobile treads and therefore held the importation subject to the duty of 5 per cent ad valorem prescribed for belting leather by the first clause of paragraph 451 and to the 10 per cent additional duty imposed by the proviso to said paragraph on leather when cut into forms suitable for conversion into manufactured articles. The importers appealed, and in support of their appeal they now insist that while the importation may be properly regarded as belting leather, it can not be classified as leather cut into forms suitable for conversion into manufactured articles or subjected to the additional duty prescribed for such forms by the proviso to paragraph 451.

So far as appears from the record the Government took no appeal from the decision of the board, and apparently does not dispute the finding of the board that the merchandise is belting leather. It does contend, however, that the leather has been cut into forms and that consequently the importation should pay duty at not less than 15 per cent ad valorem.

The merchandise was returned by the appraiser as "skins dressed and finished and cut into forms suitable for use as belts." The testimony on the part of the importers is to the effect that the leather strips are devoted by them to no other purpose than the manufacture of automobile treads and that they are imported cut to a width proportioned to the diameter of the automobile tire on which they are designed to be used. The witness, Cramer, buyer for the importers, testified that the length of the strips varied from 2 feet to 6 feet or perhaps 7 feet, but that a single strip was not sufficiently long to cover the outer circumference of the tire and that therefore it was necessary to sew together two or more strips in order to make a tread of the requisite length. We do not think that this testimony is fairly susceptible of the interpretation that the leather strips were cut to lengths wholly without regard to the use for which they were intended, and that it was a matter of indifference whether three short or two long strips would be required to make a tread. That manufacturers would naturally avoid unnecessary stitching and waste in cutting must be presumed, and it may therefore be concluded with some confidence that the leather strips used for the manufacture of automobile treads are not made up into lengths or imported at random, but with due regard to the dimensions of the tire to be covered.

In our opinion the evidence establishes that the leather strips were given a form and a size which especially and definitely adapted them for conversion into automobile treads of different lengths and widths, and although strips of that kind might be cut up into belts or in exceptional cases used for the manufacture of a belt without being cut at all, it can hardly be said that that fact made the strips any the

less peculiarly or particularly fitted for the manufacture of automobile treads.

The merchandise imported is belting leather cut into forms especially suitable for conversion into a definite manufactured article and is therefore dutiable at 15 per cent ad valorem, as found by the board.

Protest 587247 did not make the claim that the merchandise was dutiable as leather cut into forms and, as we understand the board's decision, that protest was not sustained.

The decision of the Board of General Appraisers is *affirmed*.

LORSCH & Co. *et al.* v. UNITED STATES (No. 1208).¹

IMITATION PEARL BEADS.

The testimony here is convincing that in trade and commerce, as well as in common speech, the articles of the importation are, while often called imitation pearls, equally well known as imitation pearl beads. They come accordingly within the precise terms of paragraph 421, tariff act of 1909.

United States Court of Customs Appeals, January 22, 1914.

APPEAL from Board of United States General Appraisers, G. A. 7473 (T. D. 33587).

[Affirmed.]

Comstock & Washburn (George J. Puckhafer on the brief) for appellants.

William L. Wemple, Assistant Attorney General (*Leland N. Wood*, special attorney, on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

The merchandise involved in this case was returned by the appraiser as imitation pearl beads and dutiable under paragraph 421. They were so assessed by the collector. Importers' brief refers to the importation as imitation pearls in the *form* of beads, but states that the predominating and practically exclusive use of those here involved is the manufacture of jewelry, and claims that they are therefore dutiable under the concluding provisions of paragraph 449.

The material parts of the two paragraphs in controversy we quote:

421. Beads and spangles of all kinds, including imitation pearl beads, not threaded or strung, or strung loosely on thread for facility in transportation only, thirty-five per centum ad valorem: * * *

449. * * * Imitation precious stones, including pearls and parts thereof, for use in the manufacture of jewelry, doublets, artificial, or so-called synthetic or reconstructed pearls and parts thereof, rubies, or other precious stones, twenty per centum ad valorem.

If it can be said that either paragraph equally applies to the importation that imposing the higher rate of duty would prevail. See *United States v. Morrison* (179 U. S., 456, at 463). It is not necessary, however, to rest the case on this rule of questionable equity, for it appears that imitation pearls, to be used in the manufacture of

¹ Reported in T. D. 34132 (26 Treas. Dec., 154).

jewelry, exist not in the form of beads, and are in common use. This being so, the provision for imitation pearl beads is more specific than the more general term of imitation pearls, and should prevail, in the absence of evidence showing a more restricted commercial designation. The history of the bead paragraph is given in *United States v. Morrison*, *supra*, and the conclusion was stated as follows:

From this review it is evident that in prior tariff acts beads were classified separately from imitations of precious stones, and were regarded as distinct from them and dutiable at a much higher rate. Can it be said that the act of 1890 suddenly changed a purpose so constant throughout previous legislation and did not express the change, but left it to be inferred from indefinite and ambiguous provisions—provisions which had not had that effect nor were intended to have that effect? We think not.

If it be said they were only precluded from that effect by the specific provisions for beads and that such provisions are not in the act of 1890, the answer is twofold: (1) That there is provision which applies to and embraces them. They are undoubtedly "glass and manufactures of glass," and the adequacy of that description, which is the description of paragraph 108, to include them can not be denied. An imitation of a precious stone may be a manufacture of glass, but the latter is not necessarily an imitation of a precious stone, or, more narrowly, an imitation of a precious stone within the meaning of a tariff statute. Every resemblance would not make such imitation, and the suggestion of the counsel for the United States is not without its weight—that the capability and purpose of setting must be considered. The condition seems to have been contemplated by the statute, and in the testimony for the importers there was an attempt to satisfy it. Witnesses testified that while the articles were beads they could be set and sometimes were set. Undoubtedly they could be fixed in metal, and so arranged as to conceal their perforations. * * *

(2) If the act of 1890 did not as specifically provide for beads as prior acts, glass beads as such were in the legislative mind and their various conditions contemplated. It was impossible to have in contemplation glass beads, loose, unthreaded, and unstrung and not have the exact opposite in contemplation—beads not loose, beads threaded and strung, and made provision for them. What provision? Were they to be dutiable at the same or at a higher rate than beads unthreaded or unstrung? If at the same rate—if all beads were to be dutiable at the same rate—why have qualified any of them? Were some to be dutiable at one rate and some at another rate? If made of plain glass, were they to be dutiable at 60 per cent under paragraph 108; if tinted or made to the color of some precious stone, were they to be dutiable at 10 per cent under paragraph 454? No reason is assigned for such discrimination, and we are not disposed to infer it. It is a more reasonable inference that beads threaded of all kinds were intended to be dutiable at a higher rate than beads unthreaded, and if there can be a choice of provisions that intention must determine.

Under the present state of the law, imitation pearl beads being provided for *eo nomine*, the case is made much stronger for the Government. Importers' counsel apparently recognized this and undertook to overcome the presumption of the correctness of the appraiser's classification by offering evidence tending to show that the article here in question was, prior to the act of 1909, known commercially as imitation pearls, whose use was the manufacture of jewelry, to the exclusion of any commercial classification of the articles as pearl beads. This presented the question of fact. The board found the fact against the contention of the importers, and this finding is entitled to some weight. Importers, however, contends that as the general

appraiser who wrote the opinion was not present when the testimony was taken the weight to be attached to the finding is thereby lessened. Conceding this to be in a measure true, yet as it appears that the testimony was taken before General Appraiser McClelland, who concurred in the opinion, we, in such circumstances, attach to the finding considerable weight, and in a doubtful case would give it controlling effect.

We need not, however, rest this case upon the presumption of correctness attached to the finding of the board. We have gone into the record and made a careful independent examination of the testimony, which examination leads us irresistibly to the same conclusion as that reached by the board. Without attempting a review of the testimony at length, it must suffice to say that the testimony, taken as a whole, is convincing that in trade and commerce, as well as in common speech, the articles here in question, while often spoken of as imitation pearls, are equally well known as imitation pearl beads. They therefore fall within the precise terms of paragraph 421 as held by the board, and the decision is *affirmed*.

REED & KELLER v. UNITED STATES (No. 1209).¹

1. RULE OF *EJUSDEM GENERIS*.

The term "vegetable substances" in paragraph 630, tariff act of 1909, can not be limited to articles that are strictly *ejusdem generis* with moss and seaweeds.

2. BIRCH BARK NOT ENTITLED TO FREE ENTRY.

While the rule of *ejusdem generis* must be applied with some liberality in construing paragraph 630, it would be going too far to hold birch bark to be such a vegetable substance as is there named, and the importation was properly assessed as a nonenumerated unmanufactured article under paragraph 480.

United States Court of Customs Appeals, January 22, 1914.

APPEAL from Board of United States General Appraisers, Abstract 32464 (T. D. 33464).
[Affirmed.]

Comstock & Washburn (J. Stuart Tompkins on the brief) for appellants.

William L. Wemple, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, of counsel), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

BARBER, Judge, delivered the opinion of the court:

The merchandise here is birch bark in the condition it is stripped from the tree and the appearance of the exhibit indicates that the tree from which it was taken was of considerable size. What use is made of this bark does not appear of record. No evidence was taken before the Board of General Appraisers. It was returned by the appraiser for duty as a nonenumerated unmanufactured article under paragraph 480 of the tariff act of 1909 and was so assessed by the collector. This assessment was affirmed by the board.

¹ Reported in T. D. 34133 (26 Treas. Dec., 156).

The importers in their protest allege the merchandise to be entitled to free entry under various paragraphs, but rely here, as we understand, mainly upon paragraph 630 of the same act, which is as follows:

630. Moss, seaweeds, and vegetable substances, crude or unmanufactured, not otherwise specially provided for in this section.

In the act of 1883 there were two free-entry paragraphs, one relating to "moss, seaweeds, and all other vegetable substances used for beds and mattresses," and the other to "seaweed, not otherwise provided for." These were evidently incorporated in one paragraph (653) of the act of 1890 and reenacted in paragraphs 558 and 617, respectively, of the tariff acts of 1894 and 1897, in each of which the language is identical with that of paragraph 630, as above quoted.

By paragraph 69 of the act of 1894, "sea moss or Iceland moss" was made dutiable; in 1897, by paragraph 81, this provision was made to apply to "sea moss" only; and in 1909, by paragraph 78, duty was assessed upon "moss and sea grass, eel grass, and seaweeds, if manufactured or dyed."

It is evident that in these duty paragraphs Congress has referred to the smaller forms of plant life, and in the main, if not altogether, to those of aquatic growth.

In *In re F. W. Myers & Co.* (123 Fed., 953) the Circuit Court, Ray, Judge, in speaking of these paragraphs as they appeared in the tariff act of 1897, intimates, as we understand the opinion, that the free-entry paragraph was intended to relate to vegetable substances from the sea.

In *Dodge et al. v. United States* (84 Fed., 449) the Circuit Court of Appeals of the Second Circuit was called upon to determine whether an article called crude camphor oil, a product of the tree from which also comes the crude camphor of commerce, was entitled to free entry as a vegetable substance under the paragraph in question as found in the act of 1894 or was dutiable under a paragraph relating to distilled and other kinds of oils. In the discussion of the case the court said:

Paragraph 558 refers to "moss, seaweeds, and vegetable substances, crude or unmanufactured, not otherwise specially provided for in this act." Under the familiar principle of "*noscitur a sociis*," this general phrase, "vegetable substances, crude or unmanufactured," should be restricted to such vegetable substances as are *ejusdem generis* with the substances specifically enumerated in this paragraph.

In *McAllister v. United States* (147 Fed., 773) the Circuit Court for the Southern District of New York, Townsend, Judge, considered whether roots of lilies of the valley were entitled to free entry as a vegetable substance under the paragraph as found in the act of 1894 or under paragraph 234½ of the same act covering, among other things, "lily of the valley * * * and other plants used for

forcing under glass for cut flowers." Orally discussing the question the court said "these articles are not vegetable substances in the class of moss and seaweeds under said paragraph 558" and held they were not so dutiable.

We think the foregoing decisions indicate the true interpretation of the paragraph as first enacted. But its application has been the subject of much litigation, especially before the Board of General Appraisers. To illustrate, under the act of 1890, the paragraph was held to give free entry, among other articles, to cottonseed hulls, mustard-seed hulls, hulls of the oat seed, loofah (a vegetable substance extracted from a gourdlike fruit), immortelles and natural grasses, the dried meat of the coconut, Bermuda lilies, and tonka bean crystals. Under the paragraph in the act of 1894, among other things, the dried meat of the coconut, oat hulls, pea hulls intended for cattle feed, and sugar cane cut in lengths from 6 to 8 feet were given free entry. And under the act of 1897 pine cones, pea hulls, loofah, holly branches, and angelica stalks used in making sweetmeats were accorded like favor.

The board decisions covering the subjects above referred to are cited on pages 761 and 762 of the Digest of Customs Decisions, 1908.

It will be observed, however, that, in the main, these decisions have extended the application of the term "vegetable substances" to products of the smaller forms of plant life. They seem to have been acquiesced in by the Treasury Department, and in view of the number and frequency thereof, and of such executive acquiescence therein, must be considered in now interpreting the paragraph, because, although the language thereof has been preserved without change, Congress will be presumed to have been cognizant of such interpretation and application extending through the life of so many tariff acts. Not only this, but the attention of Congress was, before the enactment of the act of 1909, expressly called to some of these numerous board decisions. See Notes on Tariff Revision (p. 748).

Considering all this we think it must be held that the strict application of the rule of *ejusdem generis* should be somewhat modified as regards this paragraph, and that the term "vegetable substances" can not be limited to articles that are strictly *ejusdem generis* with moss and seaweeds.

As to the birch bark here involved, it is apparent that it is the product of a forest tree, not however an annual product like coconut meat. The tree itself little resembles moss or seaweeds; neither does the tree nor its bark resemble in form or substance the great majority of the articles to which free entry has been given, as before mentioned.

It is true that considered without regard to the context the term "vegetable substances" is broad enough to include all substances that are the product of the vegetable kingdom, from the gigantic sequoia to the lowest form of plant life, but this term does not stand alone. It is introduced by the words "moss" and "seaweeds," which carry some indication of the class or kind of vegetable substances concerning which Congress was expressing its will, and which must be considered in construing the term itself. *Dingelstedt v. United States* (91 Fed., 112).

The term should not be applied to every vegetable substance, using those words in their broadest sense, and the rule of *ejusdem generis* should neither be lost sight of nor wholly disregarded.

It would seem that sufficient latitude in the application of the rule had been attained in the board decisions to which we have referred and in the apparent administrative practice thereunder.

But while we think, in view of all that has been said, that the rule of *ejusdem generis* must be applied with some liberality to that paragraph, we are unwilling to go so far as to admit the merchandise here to free entry under paragraph 630. Among the reasons therefor is the fact that the precise question involved in this case was under the act of 1897 before the Board of General Appraisers in Abstract 11774 (T. D. 27426), decided in 1906. Merchandise apparently identical with that at bar was there held not entitled to free entry under the paragraph, but to be dutiable as a nonenumerated unmanufactured article. Again, in Abstract 19419 (T. D. 29173), where apparently like merchandise was considered, the same conclusion was reached. This decision was affirmed in the Circuit Court by Platt, Judge, without opinion, in *Reed & Keller v. United States* (172 Fed., 453), decided May 17, 1909.

It is urged, and with much force, that these decisions of the board as to birch bark are not consistent with those admitting free entry to holly branches and some other articles. We do not attempt to reconcile them, but adhere to the views already expressed.

The conclusion we reach in this case is not inconsistent with the result reached in *United States v. Wallace* (4 Ct. Cust. Appls., 142; T. D. 33413). There the merchandise was crude horse-radish roots, the product of one of the lower forms of plant life.

We find nothing which warrants us in upholding the claim to free entry under paragraph 578, somewhat relied upon by the importers, and which relates to grasses and fibers. The rule of *noscitur a sociis* would manifestly exclude this birch bark therefrom.

The judgment of the Board of General Appraisers is *affirmed*.

UNITED STATES v. BAYERSDORFER & Co. (No. 1215).¹

EVIDENCE—CLERICAL ERROR, WHAT IS NOT.

The evidence of the admitted clerical error here was before the importers at the time they made entry. Subsequently the error in valuation was disclosed to the appraiser. These facts do not constitute a case of manifest clerical error.—*United States v. Swedish Produce Co.* (4 Ct. Cust. Appls., 223; T. D. 33437); *United States v. Wyman* (*Ibid.*, 264; T. D. 33485); *United States v. Proctor* (5 Ct. Cust. Appls., —; T. D. 34091).

United States Court of Customs Appeals, January 22, 1914.

APPEAL from Board of United States General Appraisers, Abstract 32999 (T. D. 33594).

[Reversed.]

William L. Wemple, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, of counsel), for the United States.

Submitted on record by appellees.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

This is an appeal from the decision of the Board of General Appraisers setting aside the action of the collector in assessing additional duties in the sum of \$44.38 upon an importation of merchandise invoiced as *immortelle* wreaths. They were imported at the port of Philadelphia in October, 1909. The entry was made at a gross valuation based upon the consular invoice and upon its face showed no clerical error. After the entry was made the appraiser, desiring to know the *per se* value of the invoice, instituted, as it would appear, an inquiry of the importers. A production of the office copy of the invoice showed the *per se* value of the different sizes of wreaths and extensions aggregating the same amount as the consular invoice. But it also showed that certain items were incorrectly extended. One item, the correct extension of which was 307.65 francs, was extended as 139.65 francs. Another item was extended at 78 francs, whereas the correct amount was 91 francs, making the total invoice 1,551.15 francs as against 1,370.15 francs named in the consular invoice. The correct extensions were noted in pencil on the private invoice and called to the attention of the brokers who made the entry. The entry was nevertheless made at the value stated in the consular invoice, but was advanced by the appraiser to 1,543.25 francs.

The board found as a fact that the appraiser had before him the private invoice showing this undervaluation as in the nature of a clerical error. This finding is supported in the testimony. But the time at which he had this evidence before him was not at the time of the entry, but it would appear was after he had instituted inquiry, when the office invoice was produced. The question presented is, therefore, whether, where the entry papers fail to show any clerical

¹ Reported in T. D. 34134 (26 Treas. Dec., 160).

error, and where the evidence of such clerical error is before the importer at the time he makes an entry, a subsequent disclosure of this clerical error to the appraiser entitles him to relief and to set aside an advance for undervaluation.

We think this question is ruled by cases recently considered by this court—*United States v. Swedish Produce Co.* (4 Ct. Cust. Appls.; 223; T. D. 33437); *United States v. Wyman* (*Ibid.*, 264; T. D. 33485) and *United States v. Proctor* (5 Ct. Cust. Appls., 44; T. D. 34091).

In the *Swedish Produce Co.* case it was said by De Vries, Judge:

The importer testified at the hearing that the private invoice was in his possession, and produced it. We think a fair reading of this record well warrants the conclusion that the facts establishing the undervaluation of this merchandise were in possession of the importer at the time of entry. Such does not, to say the least, present a case of manifest clerical error.

The *Proctor* case is to the same effect. The decision of the board is reversed.

ROSENHEIM *et al.* v. UNITED STATES (No. 1231).¹

EARTHY OR MINERAL SUBSTANCES—WHAT NOT.

The amorphous viscous substance of the importation, without any determinate shape or form, does not come within the provisions of paragraph 95, tariff act of 1909, as an article composed wholly or in chief value of earthy or mineral substance. There is no evidence of similitude in the record, but it is clear the substance is a manufacture not expressly provided for by any paragraph of the law in question. It was classifiable as a nonenumerated manufacture under paragraph 480.

United States Court of Customs Appeals, January 22, 1914.

APPEAL from Board of United States General Appraisers, Abstract 32480 (T. D. 33464).

[Reversed.]

Walter Evans Hampton for appellants.

William L. Wemple, Assistant Attorney General (*William A. Robertson*, special attorney, on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

DE VRIES, Judge, delivered the opinion of the court:

This appeal is from four decisions of the Board of General Appraisers. The merchandise was returned to the collector of customs at the port of New York by the appraiser at that port in a statement that "the merchandise in question consists of Amor's metal polish, an article composed wholly of mineral substances * * *." The collector assessed the same for duty under the provisions of paragraph 95 of the tariff act of 1909 as an article composed wholly or in chief value of earthy or mineral substances. The protests contain several counts, chief of which here relied upon is that the merchandise

¹ Reported in T. D. 34135 (26 Treas. Dec., 1911).

is properly dutiable as a nonenumerated manufactured article under the provisions of paragraph 480 of the said act. The Board of General Appraisers in all of the cases overruled the protests upon the ground that there was not sufficient evidence in the record to warrant the board in disturbing the decisions of the collector. The importers appeal.

The record discloses that the decisions of the board were rendered in the absence of further testimony than that which came to the board from the collector. An application for rehearing was made and overruled in each case. The merchandise was returned by the local appraiser to the collector as above stated. Samples of the merchandise, together with an analysis thereof made by the Government chemist at the port of New York, accompany the record, duly identified. These samples evidence a material much like that the subject of the decision of this court in *United States v. Holland-American Trading Co.* (4 Ct. Cust. Appls., 336; T. D. 33527). The analysis states:

Amor Metal Polish. * * * The same has the following components: Fat (by loss in ignition), 55.88 per cent; mineral residue consisting of silica, alumina, and iron oxide, probably clay, 44.12 per cent.

In each of the decisions the Board of General Appraisers recites that the merchandise in these cases consists of "*Amor's metal polish.*" There is ample in this record to disclose that the conclusion of the board was not warranted by the facts disclosed in the record and recited in each of its opinions.

This court in frequent decisions has held that the words "articles and wares composed wholly or in chief value of earthy or mineral substances," as used in paragraph 95 of the tariff act of 1909, do not include an impalpable powder. *Salomon v. United States* (2 Ct. Cust. Appls., 92; T. D. 31635); *United States v. Embossing Co. et als.* (3 Ct. Cust. Appls., 220; T. D. 32536); *Bartley Bros. & Hall et als. v. United States* (3 Ct. Cust. Appls., 363; T. D. 32961). It is fully within the principles of said decisions that amorphous, viscous substances of this description, without any determinate shape or form, are likewise for the reasons therein stated not included within the provisions of said paragraph 95. Such substances are more like the "plastiline" or "plastilina" the subject of decision by this court in *United States v. Embossing Co., supra*, and held not within the description of "articles and wares" as used in paragraph 95, for the reason that it was not of "specific form for definite and ultimate use."

Whether or not the article is properly dutiable by similitude of use to whiting, as was held of Goddard's plate powder in *Bartley Bros. & Hall et als. v. United States, supra*, and later of the same material in *United States v. Kraemer & Co. et al.* (4 Ct. Cust. Appls., 433; T. D. 33858), there is not sufficient evidence in this record to

determine. Similitude is a question of fact, which must be established by evidence. In the absence of such evidence in the record, however, it is clear that the article is not properly dutiable as assessed by the collector and as held by the Board of General Appraisers. It is equally clear that it is a manufacture. Likewise it is clear that it is not expressly provided for by any paragraph of the tariff law. It, therefore, upon this record would be properly classifiable for dutiable purposes as a nonenumerated manufactured article under the provisions of paragraph 480, as claimed by the protestants, who are appellants here. This decision, however, must for want of a more complete record be confined to this record, as was the decision of this court in *United States v. Holland-American Trading Co.*, *supra*, confined to the record in that case.

Reversed.

UNITED STATES *v.* SAUNDERS *et al.* (No. 1244).¹

MILL BUTTINGS—FIREWOOD.

The evidence here is that not over 30 per cent of these importations is suitable for or is used for making matches, and that the remainder is used for firewood. The merchandise—ends cut from deals or planks—should be classified as firewood, and was entitled to free entry.

United States Court of Customs Appeals, January 22, 1914.

APPEAL from Board of United States General Appraisers, Abstract 33069 (T. D. 33644).

[Affirmed.]

William L. Wemple, Assistant Attorney General (*Frank L. Lawrence*, special attorney, on the brief), for the United States.

Brown & Gerry for appellees.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

BARBER, Judge, delivered the opinion of the court:

The question here is whether so-called mill buttings are entitled to free entry under paragraph 712 of the tariff act of 1909 or dutiable under paragraphs 201 or 479 of the same act. The material portions of the paragraphs are here inserted:

201. * * * Sawed lumber, not specially provided for in this section, one dollar and twenty-five cents per thousand feet, board measure.

479. Waste, not specially provided for, ten per centum ad valorem.

712. Wood; logs and round unmanufactured timber, including pulp woods, firewood, * * *.

The case involves two appeals, the collector having assessed the merchandise, which is the same in each case however, in one instance under paragraph 201 and in the other under paragraph 479. The board reversed the collector and sustained the protests.

These mill buttings consist of the ends cut from deals or planks manufactured in Canada for the English market. The logs from

¹ Reported in T. D. 34136 (26 Treas. Dec., 193).

which the deals are sawed are cut a little longer than the deals themselves. These logs are evidently floated downstream to the sawmill, and, as a quite natural result of this method of transportation, the ends of the logs become bruised or injured and after the deals are sawed therefrom they are butted, the product being the merchandise here.

The samples used as exhibits in the case vary from 4 to 10 inches in length, running with the grain of the wood, from 8 to 12 inches in width, and all are 3 inches thick, but the evidence shows that some are 3 feet in length. The only use made of these deal ends in Canada is for firewood and they are used there for that purpose.

The importations before us were in carload lots and were sold to the Ohio Match Co.

The Government contends that the evidence shows that the particular importations were wholly for the purpose of making matches, and, further, that it fails to show that they were firewood or were intended to be so used.

As we understand the evidence, it is to the effect that not only these particular importations but many others have by the Ohio Match Co. been taken to their factory and such pieces as were of sufficiently good quality used in the manufacture of matches; that the balance was sold or used for firewood; and that the importers have sold some importations, not perhaps those involved in this case, but of like nature, for firewood.

The Board of General Appraisers in G. A. 6573 (T. D. 28070), which apparently involved merchandise like these mill buttings, held they were entitled to free entry as pulp wood under paragraph 699 of the act of 1897, it appearing in that case that they were used for that purpose.

In T. D. 32926 apparently like merchandise was claimed and by the board held to be entitled to free entry under paragraph 712 of the act of 1909, hereinbefore quoted, and in sustaining the protests here the board rely upon the authority of those cases.

In the board decision first above mentioned, reference is made to T. D. 25166, where spruce sticks or logs about 10 inches in diameter, cut into lengths of from 2 to 2½ feet and rossed, and which were shown to be chiefly if not solely used to make wood pulp, were held entitled to free entry under paragraph 699 of the act of 1897, which ruling was affirmed in *United States v. Pierce* (140 Fed., 962, and again in 147 Fed., 199).

In the case at bar the board has found that the merchandise is used for firewood and match blocks. We think the evidence supports the finding and that the finding is to be construed in the light of the evidence, which is that not over 30 per cent of these importations is suitable for or is used for matches and that the balance is used for firewood.

The Government relies somewhat upon T. D. 20100, where certain mill buttings were held dutiable at 20 per cent ad valorem as match blocks under paragraph 200 of the act of 1897, relating to certain blocks and all other "like blocks or sticks," as against the claim for free entry as firewood. That case, as we read it, related to importations of assorted mill buttings, all of which were found to be match blocks suitable for the purpose of that manufacture and not firewood, and therefore seems to be distinguishable from the case at bar.

We are of opinion, after a review of all the authorities cited and in view of the facts here, that this merchandise should be classified as firewood and entitled to free entry. Were not firewood upon the free list it might appropriately be dutiable as waste under paragraph 479, but Congress has seen fit to give free entry to firewood and we think its mandate is properly invoked in this case.

The judgment of the Board of General Appraisers is *affirmed*.

ZIMMERMANN & MEYER *et als.* v. UNITED STATES (No. 1248).¹

1. STARE DECISIS.

After the elimination of the "wool" theory, horsehair braids and hats were always assessed under the act of 1897 by similitude with silk braids and hats, except for an interval when this practice was inhibited by an erroneous rule of construction that was subsequently expressly disapproved by this court.

2. HORSEHAIR BRAIDS AND HATS.

Upon the present record it is held that the importers failed to sustain the burden of proof in showing the assessment was wrong and that the importation was properly held dutiable by similitude to silk braids and silk hats under paragraph 390, tariff act of 1897.

United States Court of Customs Appeals, January 22, 1914.

APPEAL from Board of United States General Appraisers, Abstract 33264 (T. D. 33668).

[Affirmed.]

Comstock & Washburn (George J. Puckhafer on the brief) for appellants.

William L. Wemple, Assistant Attorney General (*Martin T. Baldwin*, special attorney, of counsel), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MARTIN, Judge, delivered the opinion of the court:

The merchandise now in question consists of hat braids made of real horsehair and women's untrimmed hats made from such braids. The articles were imported under the tariff act of 1897, and the collector assessed duty thereon at the rate of 60 per cent ad valorem by similitude to silk braids and silk hats, respectively, under paragraph 390 of that act.

¹ Reported in T. D. 34137 (26 Treas. Dec., 1915).

The importers protested, claiming assessment of the braids at 20 per cent ad valorem and the hats at 35 per cent ad valorem by similitude to straw braids and straw hats, respectively, under paragraph 409 of the same act. An alternative claim was made in the protest that the hats were dutiable at 50 per cent ad valorem by similitude to cotton wearing apparel under paragraph 314 of the act.

The protest was submitted upon evidence to the Board of General Appraisers and was overruled, from which decision the importers prosecute their present appeal.

The following relevant provisions of the tariff act of 1897 are copied for reference:

Sec. 7. That each and every imported article, not enumerated in this Act, which is similar, either in material, quality, texture, or the use to which it may be applied, to any article enumerated in this act as chargeable with duty, shall pay the same rate of duty which is levied on the enumerated article which it most resembles in any of the particulars before mentioned; and if any nonenumerated article equally resembles two or more enumerated articles on which different rates of duty are chargeable, there shall be levied on such nonenumerated article the same rate of duty as is chargeable on the article which it resembles paying the highest rate of duty; * * *.

Par. 390. Braids, * * * and articles of wearing apparel of every description, made up or manufactured in whole or in part * * *; made of silk, or of which silk is the component material of chief value * * *, sixty per centum ad valorem.

Par. 409. Braids, * * * composed wholly of straw, chip, grass, * * * suitable for making or ornamenting hats * * *; if bleached, dyed, colored, or stained, twenty per centum ad valorem; hats, * * * composed of straw, chip, grass, * * * whether wholly or partly manufactured, but not trimmed, thirty-five per centum ad valorem. * * * But the terms "grass" and "straw" shall be understood to mean these substances in their natural form and structure, and not the separated fiber thereof.

Par. 314. Articles of wearing apparel of every description, * * * composed of cotton, * * * made up or manufactured, wholly or in part, * * * fifty per centum ad valorem.

The tariff act of 1897 contained no enumeration of horsehair braids or horsehair hats; therefore the importations must either be assessed under the similitude rule or be treated as nonenumerated manufactured articles. It is clear, however, that the horsehair braids and hats bear a substantial resemblance in tariff particulars to braids and hats made either of silk, straw, or cotton; therefore the nonenumerated provision can not apply. The sole question, therefore, is whether the importations most resemble braids and hats of silk, straw, or cotton, in respect to material, quality, texture, and use.

The matter of the dutiable classification of horsehair braids and hats under the tariff act of 1897 has been the subject of an unusual number of decisions. It seems that under the act of 1897 the collector first classified and assessed horsehair braids and hats as articles

"composed of wool," by virtue of paragraph 383 of that act, which provided that the word "wool," when used in connection with a manufactured article of which it is a component material, "shall be held to include wool or *hair* of the sheep, camel, goat, alpaca, or *other animal*." The collector was sustained in this construction by the Board of General Appraisers in the *Donat* case (T. D. 22843) (Somerville, G. A., dissenting). The importers, however, appealed from the board's decision in the foregoing case, claiming that the horsehair braids in question were not enumerated under the wool provisions, but were nonenumerated articles dutiable by similitude with silk braids under paragraph 390 of the act of 1897. It may be remarked that this is the identical claim made by the Government in the present case. Upon this appeal the Circuit Court, Southern District of New York, sustained the foregoing claim of the importers, holding that under the act of 1897 horsehair braids were not dutiable as "articles composed of wool," but were dutiable by similitude with silk braids under paragraph 390 of the act. The Government expressly acquiesced in this decision. *Donat v. United States*, decided June 4, 1903 (134 Fed., 1023), more fully reported as T. D. 25113. See also *In re Rheims* (T. D. 25109); *In re Rosenberg* (T. D. 25022).

After the publication of the Circuit Court's decision in the *Donat* case, *supra*, the board continuously held that horsehair braids and horsehair hats were dutiable under the act of 1897 by similitude with silk braids and silk hats. These several decisions were rested by the board in part upon the superior resemblance of the horsehair articles to the silk articles, and also in part upon the rule that the higher rate of duty should control in cases of equal similitudes. In the *Herrman* case (T. D. 26150), hats composed of horsehair and straw, horsehair being chief value, were held by the board to be dutiable by similitude with silk hats under the same act; and in the *Wanamaker* case (T. D. 28217), horsehair hats were held by the board to be dutiable by similitude with silk hats as against hats of straw. In the case last cited, Fischer, G. A., speaking for the board, said:

From the trend of the testimony submitted, it is evident that counsel for the importer was endeavoring to show that horsehair hats were properly dutiable by similitude to straw hats, but in our opinion the attempt is a failure. His chief reliance appears to be on the alleged circumstance that horsehair hats are worn in the same season as straw hats, to wit, the summer; but aside from the fact that the testimony does not establish with certainty that such is the case, it is in evidence that some hats—lace hats, for instance—are worn both in summer and winter, and that horsehair hats are not worn exclusively in the summer season.

Another point that is strongly, not to say conclusively, against the contention of the importer that these hats are similar for duty purposes to straw hats, is that they do not resemble such hats in the statutory particulars of material, quality, and texture. Paragraph 409 expressly provides that the terms "grass" and "straw" as used therein "shall be understood to mean these substances in their natural form and structure, and not the separated fiber thereof." Counsel for the Government intro-

duced in evidence illustrative samples of straw braid, such as is provided for in paragraph 409, and its entire dissimilarity to the material of which these hats are composed is seen at a glance. If these hats were in fact straw, they would not be dutiable under paragraph 409, for straw in such shape would be the separated fiber of straw, and hence excluded by the very terms of paragraph 409 from classification thereunder. If, then, hats that are made of the separated fiber of straw can not be classified under that paragraph for the reason that they are expressly excluded therefrom, how can it be contended that hats whose only resemblance to any kind of straw hats is to those made of the separated straw fiber are dutiable under that paragraph? Other considerations that suggest themselves are that real horsehair is, of course, an animal product, while the substances provided for in paragraph 409 are all vegetable, thus differing essentially in material, and also that hats of this character are, as shown by the evidence of one of the importer's witnesses, more expensive than either cotton or straw hats.

Afterwards this subject came again before the board and courts in the cases of *United States v. Rheims* (175 Fed., 778; T. D. 30226) and *Paterson v. United States* (166 Fed., 733; T. D. 29377). In those cases the Circuit Court of Appeals for the Second Circuit reversed the decision of the board in the *Paterson* case, Abstract 16500 (T. D. 28384), and overruled the foregoing line of decisions of the board, the court holding that horsehair braids and hats were dutiable by similitude with straw braids and hats under paragraph 409 of the tariff act of 1897, rather than by similitude with silk braids and hats under paragraph 390 of that act. The court in its opinion conceded that horsehair hat braids, in point of material, texture, quality, and use resembled silk hat braids more nearly than straw hat braids; it based its decision, however, solely upon the fact that straw hat braids were specifically enumerated in the act of 1897, while the silk articles were given only a generic enumeration therein, namely, as "silk braids," and were not specifically enumerated therein as "silk hat braids." This reasoning resulted in assessing the importations not according to their actual degrees of resemblance to the several enumerated articles in question, but rather according to the relative degrees of specificity with which the enumerated articles themselves were severally named in the tariff act.

Afterwards, however, this court refused to follow the reasoning of the Circuit Court of Appeals in the cases just cited. See *United States v. Cochran* (3 Ct. Cust. Appls., 57; T. D. 32349) and *United States v. Buss & Warner* (3 Ct. Cust. Appls., 87; T. D. 32357). In the last cited case, presiding Judge Montgomery, speaking for this court, said:

By the very terms of the similitude clause an importation not named is to be assessed at the same rate as the article that is named either generally or particularly *which it, the imported article, most resembles*. The case of *Paterson v. United States* (166 Fed. Rep., 733), cited by the importer, does not, in our opinion, state the correct rule.

Since the publication of the foregoing decisions of this court the board has followed its original line of decisions and held that under the tariff act of 1897 horsehair braids and hats were dutiable by similitude with silk braids and hats rather than with straw braids and hats. See *Joseph's case* (T. D. 32617). During the interval

which ensued between the decisions of the Circuit Court of Appeals in the Rheims and Paterson cases and the decisions of this court in the Cochran and Buss & Warner cases the board entered numerous decisions in accordance with the principle, afterwards overruled, announced in the Rheims and Paterson cases. Zimmermann case (T. D. 29687); Dearbergh Bros. case, Abstract 21272 (T. D. 29790).

The foregoing review of the reported cases discloses the fact that after the elimination of the "wool" theory, horsehair braids and hats were always assessed under the act of 1897 by similitude with silk braids and hats, except for an interval when this practice was inhibited by the erroneous rule of construction announced in the Paterson case, which rule was afterwards expressly disapproved by this court. This recital seems to answer the claim of the importers that the present case should be governed by the decisions announced during that interval, under the rule of *stare decisis*, for it clearly appears that all the time horsehair braids and hats were held to assimilate in fact to silk braids and hats and their assessment accordingly was only suspended for a time by the promulgation of an erroneous rule of construction, which had no relation to the actual resemblance of the articles in question.

Coming now to the present case, the record presents a single question of fact, namely, whether the imported horsehair braids and hats actually resemble silk braids and hats either more than, or as much as, straw or cotton braids and hats in respect to material, quality, texture, and use. If the horsehair articles most resemble the silk articles in the statutory particulars, they should be assessed by similitude with them because of this superior resemblance. Moreover, if the horsehair articles equally resemble the silk and straw or the silk and cotton articles, still they should be assessed by similitude with silk rather than with straw or cotton, because the silk rate of duty was the higher one under the act and therefore should be applied to the importations.

Various claims are made by the respective parties upon the question of actual resemblance between the horsehair articles and the several competing standards. On the one hand, it is claimed by the Government that horsehair, like silk, is of animal origin and has many characteristics in common with silk; that both are round, tough filaments of enduring animal material, while straw is flat, flimsy, brittle, and of vegetable origin and material. It is also claimed by the Government that the horsehair articles are similar to silk articles in appearance and use. On the other hand, it is especially urged by the importers that horsehair hats, unlike silk hats, are most used for summer wear and in that particular best assimilate to straw or cotton hats.

It is difficult to weigh with accuracy or certainty the relative values of these conflicting claims. At the trial before the board the burden of proof was upon the importers, and it became their duty to sustain

their claim by the proofs. The testimony, however, as it appears in the record is meager and unsatisfactory. The question in issue relates chiefly to the alleged similarity of horsehair braids and hats with straw braids and hats; yet no straw braids or hats were placed in evidence as illustrative exhibits for actual comparison. It may be said that the materials, quality, texture, and uses of straw braids and hats are all within common knowledge and therefore that such samples were unnecessary. To some extent this is doubtless true, but common knowledge alone without the aid of samples is hardly sufficient for a comparison of the horsehair importations upon the one hand with competing silk and straw braids and women's silk and straw hat bodies upon the other hand. This failure of straw samples becomes the more important because of the statutory provision that the term "straw" shall be understood to apply to that substance in its natural form and structure only, and not to the separated fiber thereof. A reference to the board's decisions in the Wanamaker case (T.D. 28217), above copied, and in the Paterson case, Abstract 16500 (T. D. 28384), above cited, discloses that this point was considered by the board upon the actual samples of straw braids and hats then before it to be a decisive one, and the decisions entered upon the evidence in those cases were largely rested upon it. Common knowledge alone hardly furnishes sufficient authority for a decision upon such an issue of fact.

It should also be remembered that the collector's assessment must be sustained in case the horsehair braids and hats equally resemble both silk, straw, and cotton braids and hats, because of the rule applying the higher rate of duty in such a case.

The importers seem to place their real reliance upon the claim that horsehair hats are chiefly or always worn in spring or summer, and that silk hats are not worn in those seasons. This claim, however, is left in a state of uncertainty by the testimony of the Government's witness Morant. That witness testified that silk braids have long been imported into this country for the manufacture of women's summer hats. A sample of such braids was placed in evidence and corresponds with the witness' statements. It thus appears that the chief claim of the importers is made uncertain by the contradictory evidence in the record, for women's silk hats are worn to some extent in the summer and it is probable that women's horsehair hats are worn to some extent in the winter. In respect to the alternative claim relating to the similitude of the horsehair articles to cotton articles, it may be noted that under the act of 1897 cotton and silk hat braids bore the same rate of duty; and as to hat bodies of cotton the record is not sufficiently clear to require a reversal.

Upon the present record, therefore, the court holds that the importers have failed to sustain the burden of proof which was cast upon them by the issue, and the decision of the board is *affirmed*.

UNITED STATES *v.* BUSS & Co. (No. 1262).¹

COAT HANGERS NOT TAPES.

The merchandise consists of running lengths of woven cotton strips with cross marks appearing at short intervals to indicate the points for cutting the strips into small pieces suitable for use as coat hangers. The uncontradicted testimony is to the effect that the merchandise has been for a number of years used exclusively for coat hangers and that there is no other use to which they are commercially applied. They were not dutiable as tapes but as manufactures of cotton not specially provided for under paragraph 332, tariff act of 1909.

United States Court of Customs Appeals, January 22, 1914.

APPEAL from Board of United States General Appraisers, Abstract 33475 (T. D. 33727).
[Affirmed.]

William L. Wemple, Assistant Attorney General (*Martin T. Baldwin*, special attorney, on the brief), for the United States.
Brown & Gerry for appellees.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MARTIN, Judge, delivered the opinion of the court:

The merchandise involved in this case consists of narrow strips of woven fabric made of cotton, black in color, about one-third of an inch in width, and imported in running lengths. The article has the appearance of ordinary cotton tape except that at intervals about 3 inches apart appear certain cross marks or ridges produced in the weaving. The purpose of the cross marks is to indicate the points at which the article may be cut in order to produce small pieces of equal length suitable for use as coat hangers.

The appraiser reported the merchandise to be "coat hangers in the piece, which is in fact cotton tape," and advised assessment thereof as tapes composed of cotton under paragraph 349 of the tariff act of 1909. The collector accordingly assessed the importation with duty at 60 per cent ad valorem as cotton tape under that paragraph.

The importers protested, claiming assessment of the article as a manufacture of cotton not specially provided for, dutiable at 45 per cent ad valorem under paragraph 332 of the same act.

The protest was submitted to the Board of General Appraisers and was sustained, from which decision the Government now appeals.

It is not necessary to copy the paragraphs of the act under which the competing claims are made. It is sufficient to state that paragraph 349 imposes duty at the rate of 60 per cent ad valorem upon cotton "tapes," and that paragraph 332 imposes duty at the rate of 45 per cent ad valorem upon "manufactures of cotton not specially provided for." If the articles at bar are tapes they would be dutiable as such under paragraph 349; if they are not tapes they would be dutiable as manufactures of cotton not specially provided for under paragraph 332. Therefore the sole question at issue is whether the importation consists of tapes.

¹ Reported in T. D. 34138 (26 Treas. Dec., 171).

The following definitions of the word "tape" are taken from standard authorities:

Century:

2. A narrow strip of linen or of cotton, white or dyed of different colors, used as string for tying up papers, etc., or sewed to articles of apparel, to keep them in position, give strength, etc.

Webster:

A narrow fillet or band; a narrow piece of woven fabric used for strings and the like.

Standard:

A narrow, stout strip of woven fabric, forming a flat cord; much used for tying together various parts of apparel, or binding different objects in parcels; also in printing presses and paper-folding machines for guiding the movement of paper.

Worcester:

A narrow fillet or band, usually of cotton or linen, and used for tying or binding, etc.

It appears from the record that when the appraiser came to pass upon the identity of the present merchandise he described it as "coat hangers in the piece, which is in fact cotton tape." The appraiser also retained an official sample of the merchandise, which he incorporated in the record under the name of "coat hangers in the piece." It appears from the oral testimony that the present importer has dealt in these articles for the last 14 years, that they are intended to be cut into pieces at the cross marks, that they are "coat hangers," and that they have no other use.

The term "coat hangers," therefore, is used alike by the appraiser and the importer to signify short lengths of narrow fabric which are sewed upon garments and serve as catches in hanging them upon hooks. It seems to be assumed by both the appraiser and the importer that such coat hangers, if cut apart, would not be tape in the tariff sense nor dutiable under that name. But the appraiser reports that the "coat hangers in the piece" are "in fact cotton tape," whereas the importer maintains that the coat hangers in the piece are not tape but are coat hangers nevertheless.

The apparent assumption just referred to, namely, that coat hangers, if cut apart, would not be dutiable as tape, is certainly well founded; for such short pieces of narrow fabric would not serve any of the purposes for which tape is ordinarily used according to the definitions above given. To the contrary, such short lengths would be unfitted for those uses and would be useful only as coat hangers. Furthermore, it is within common knowledge that such short pieces do not in general pass under the name of tape; and there is no proof in the record of any special or peculiar commercial usage of that term. It is therefore proper to assume that the common and commercial usages of the term are identical. It may therefore be concluded that coat hangers, if cut apart, would not be dutiable as tape, and the sole

question in the case is whether they are dutiable as tape if imported in the piece.

In connection with the foregoing question some authorities may be cited from analogous cases.

In the case of *Oppenheimer v. United States* (66 Fed., 52) silk veils in the piece, with borders upon them, and a distinctly marked line between the borders indicating where they were to be cut off, were held by the Circuit Court of Appeals, Second Circuit, to be dutiable as wearing apparel and not as manufactures of silk not specially provided for. In other words, veils in the piece were held to be dutiable as veils, under the provision for wearing apparel. The provision in question contained the clause, "made up or manufactured wholly or in part by the tailor, seamstress, or manufacturer," and this clause is referred to as the italicized portion of the paragraph, in the following quotation.

LACOMBE, *Circuit Judge*: * * * The merchandise imported in this case is clearly within the italicized portion of this paragraph. It is made up "in part," the operation of making up having progressed so far that it is easy to identify the particular article of wearing apparel it is to be, and the materials out of which it is made being rendered, so far as the evidence shows, practically useless for any other purpose. In this respect it differs from *In re Mills* (56 Fed., 820), where the hemstitched lawns were as well adapted for use as window curtains as they were for women's skirts and aprons. Veils are manifestly wearing apparel, and these goods, being veils which only need to be cut off from the piece in order to be ready for use, were properly classified for duty as such.

In the case of *Robinson v. United States* (122 Fed., 970), it was held by the Circuit Court, Southern District of New York, that so-called mourning crapes consisting of all-silk fabrics in the piece, used chiefly for trimmings, were dutiable as silk trimmings and not as woven fabrics in the piece.

In the *Fleitmann* case (T. D. 22561), the Board of General Appraisers held that ribbons composed of silk and cotton, silk chief value, woven in the gray or gum in the piece, in different widths, indicated by the absence of filling threads, and requiring only to be cut after dyeing to separate them into individual ribbons, were to be classified the same as ribbons not in the piece.

In the *Kaskel* case (T. D. 26613), the Board of General Appraisers held that men's silk scarfs imported in pieces of various lengths, each scarf being definitely indicated by the absence of warp and filling threads at intervals where they have only to be cut to separate them into individual scarfs, and which are adapted for no other use than scarfs, are dutiable as "articles of wearing apparel * * * made up or manufactured in whole or in part by the tailor, seamstress, or manufacturer."

See also the *Spielmann* case (T. D. 15866), silk veils in the piece the *Modry* case (T. D. 15867), printed cotton bibs in the piece; and the *Wolff* case (T. D. 20047), narrow woven strips of white cotton

with single letters of the alphabet therein with colored threads at intervals of about half an inch.

On the other hand, in the case of *In re Mills* (56 Fed., 820), relating to cotton hemstitched lawns imported in pieces of from 28 to 30 yards in length and 45 inches in width, having a broad hem about 5 inches wide turned over and sewed down on one side of the fabric, the body of the goods being a homogeneous cotton cloth, containing from 150 to 200 threads to the square inch, counting warp and filling, but openwork patterns or figures made by drawing out threads appearing continuously upon certain parts of the goods, the merchandise being chiefly used for women's and girls' dresses, skirts, and aprons, the broad hem constituting a part of such garments when made up, *but the materials being also sold for sash curtains*, it was held by the Circuit Court, Southern District of New York, that the lawns were properly dutiable as manufactures of cotton and not as partly made cotton wearing apparel.

The rule expressed by the decisions just cited recognizes the fact that most small articles are not produced as individual or separate products of the loom, but for economy of manufacture are first woven "in the piece." The rule of decision is therefore established that where such articles are imported in the piece and nothing remains to be done except to cut them apart they shall be treated for dutiable purposes as if already cut apart and assessed according to their individual character or identity. This follows, however, only in case the character or identity of the individual articles is fixed with certainty and in case the woven piece in its entirety is not commercially capable of any other use.

According to the foregoing rule the present decision should depend upon whether the articles at bar are commercially sold and used exclusively for coat hangers or whether they are at times commercially sold and used as tapes. For if the articles are best adapted for use as coat hangers, but nevertheless are at times commercially sold and used in the piece as tapes, then they should be assessed when in the piece with duty as tapes. This question of course is one of fact to be determined upon the testimony, including the appraiser's report and the samples. In answer to this question it appears by the uncontradicted testimony in the case that the present articles during the past 14 years have been used exclusively for coat hangers and that there is no other use to which they are commercially applied. It is true that the articles are not absolutely incapable of use in the piece as tapes; nevertheless the cross marks which have been woven into them are unnecessary and even detrimental to such uses. The articles are thereby not only especially adapted to their peculiar use as coat hangers, but they are also appropriated thereunto, for it is plain that they would no longer pass as ordinary tapes. These cir-

cumstances lend probability to the statement of the witness that the articles are in fact used for no other purpose than coat hangers. It is true that the demarcations between the several coat hangers in the piece are not so obvious to the eye as are those described in many of the cited cases; nevertheless they serve the same purpose and bring the case within the same rule. The present fabric is narrow and black; the cross marks also are black, and are therefore inconspicuous. If the goods were one color and the cross marks were another the divisions would be more obvious. This, however, would add to the cost of the article and would not add to its utility as coat hangers. The inconspicuousness of the cross marks, therefore, is not evasive, and it appears without contradiction in the testimony that the merchandise is designed to be used exclusively as coat hangers and is in fact exclusively used as such. According to the principles expressed by the foregoing cases the court concludes upon the facts that the present importations are not dutiable as tapes but as manufactures of cotton not specially provided for, and that the decision of the board to that effect should be affirmed.

In support of this conclusion two suggestions may be added: First, the importer is entitled at assessment to the benefit of the doubt; second, the decision of the board upon the question of fact involved in the case is to be accepted as correct by this court unless clearly contrary to the evidence or unsustained by it.

The decision of the board is *affirmed*.

UNITED STATES *v.* MACNAUGHTON (No. 1237).¹

WOOD—ROUND UNMANUFACTURED TIMBER.

These white-oak logs were imported substantially as the tree had fallen when cut down. The branches had been cut off, but the logs had not been peeled or sided. It is doubtful if importations of this character and condition are within the letter or spirit of paragraph 200, tariff act of 1909, and there is nothing in the record so convincing of the contrary as to warrant a reversal. The logs were properly held not dutiable as being the round unmanufactured timber of paragraph 712.

United States Court of Customs Appeals, November 28, 1913.

APPEAL from Board of United States General Appraisers, Abstract 32938 (T. D. 33594).

[Affirmed.]

William L. Wemple, Assistant Attorney General (*Frank L. Lawrence*, special attorney, on the brief), for the United States.

Submitted on record by appellee.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

DE VRIES, Judge, delivered the opinion of the court:

The determination of this appeal rests upon the construction to be given the testimony in the case, and particularly one statement made

¹ Reported in T. D. 34166 (26 Treas. Dec., 226).

by the importer, who is appellee here, called as a witness in his own behalf. His testimony was brief and is as follows:

J. J. MacNaughton, called as a witness in his own behalf, being duly sworn, testified as follows:

Q. (By Mr. BIRD.) What is your business?—A. Wholesale lumber.

Q. You are the importer of white-oak piles protested against in this case?—A. Yes. * * *

Q. Let us have the facts.—A. They are rough unmanufactured timber; they come in just as they were dropped in the forest.

Q. How long were they?—A. Forty-five feet.

Q. Were they peeled?—A. Fifty feet, I believe.

Q. They were substantially the length they were cut in the forest?—A. Yes.

Q. Were they peeled?—A. No.

Q. Were they sided?—A. No, sir.

Q. Were they just as they were dropped?—A. The branches were cut off.

Q. Otherwise they were in the rough?—A. Yes.

Q. (By Mr. LAWRENCE.) Is this timber ever used for spiles?—A. No, sir.

Q. Ever used in building wharves?—A. No, sir.

Q. I mean similar timber?—A. Yes; at times.

Q. *Common use for it?*—A. *I would say they were generally used for building wharves.*

(By General Appraiser McCLELLAND.) But they were in the rough state?—A. Yes; this timber was used for fender spiles, to protect the boats from knocking against it. They were in the rough state.

The merchandise, which is fully described in the testimony quoted, was rated for duty by the collector of customs at the port of Buffalo under the provisions of paragraph 200 of the tariff act of 1909, providing for “* * * round timber used for spars or in building wharves, * * *.”

The importer protested, founding his claim under the provisions of paragraph 712 of the same act, which may be quoted as follows:

Wood: * * * Round unmanufactured timber, * * * all the foregoing not specially provided for in this section.

The Board of General Appraisers found “that the merchandise consists of round or unmanufactured timber,” reversed the decision of the collector, and sustained the protest. The Government appeals. The appellee makes no appearance in this court other than to submit the case upon the record.

The Government’s sole contention is that use determines the dutiable status of this merchandise as properly classifiable under the provisions of said paragraph 200. The argument is based in the main if not entirely upon the testimony of the importing witness, wherein the following colloquy ensued:

Q. Common use for it?—A. I would say they were generally used for building wharves.

This is the only testimony in the record which indicates a use of the particular importation or similar importations for the purposes of building wharves. There is no testimony of a use for spars. Accord-

ingly the decision must be rested upon the force and effect of that part of the testimony quoted.

Inasmuch as the statute, paragraph 200, makes use the determining factor of all merchandise included therewithin for dutiable purposes, the unquestionable rule of law in the case, if it should appear that the imported merchandise was chiefly used either for spars or for building wharves, would make it properly classifiable for duty under the provisions of paragraph 200. That principle has been so often enunciated it seems trite to argue the question. *Vandiver v. United States* (1 Ct. Cust. Appls., 194; T. D. 31219); *United States v. Hempstead & Son* (3 Ct. Cust. Appls., 436; T. D. 33004); *Hartranft v. Langfeld* (125 U. S., 128); *Magone v. Wiederer* (159 U. S., 555).

Does the testimony in this record establish that the chief use of such timbers as these is for the construction of wharves? There is neither evidence nor contention in the record that it is chiefly used for spars. We do not think that the language of the witness fairly considered is of that import which would warrant the assessment of duty provided by paragraph 200. The question was, first, was this timber "ever used in building wharves?" and the answer was "No." Here the witness evidently referred to the identical timber. The next question was, "I mean similar timber," to which he frankly answered, "Yes; at times." Then counsel for the Government asked the question, if this was a "common use for it?" to which he answered, "I would say they were *generally* used for building wharves."

Both the definitions of the words "common" and "generally" and the language as used is susceptible of two interpretations. A thing may be generally used for a certain purpose where that use is simply a common one or one not uncommon or unfamiliar, but which, nevertheless, does not constitute its chief use. In that sense the word "generally" is coextensive with the word "common," and the fact that the witness used the word "generally" in response to a question addressed to "common" use indicates that the witness understood the terms coextensive and his answer in that sense. He may have meant, and probably did mean, to respond that such was a common—that is, not uncommon—use for such timber. It is a common use, indeed a general use, for bricks in building fireplaces, but it is not their chief use. It is a common use for plate glass to cover desks, but is not the chief use of plate glass. It is a common use for bolts in the building of wharves, but not their chief use. In this sense "common" and "generally" bespeak only a use which is not infrequent and which is common to everyday observation, but which, nevertheless, may not be the chief use of such an article. So that, as is indicated by the context, we can not say that the witness intended to or did testify that the use of such timber for making wharves was other than a matter of frequency, or not uncommon. It is certainly a very

dubious and fragmentary bit of evidence upon which to reverse a decision of the Board of General Appraisers and predicate a finding that the timber with which wharves in this country are constructed is chiefly of the class represented by this importation.

The learned general appraisers seem to have rested their decision in a great measure upon the fact that these logs were not peeled, but as they fell from the tree. In the absence of an established commercial usage, it was permissible for them, and they probably did indulge a common knowledge that such timbers are not usually used for spars or in the building of wharves in their imported condition, but rather are ordinarily further processed by barking at least. It is doubtful if importations of this character and condition are within the letter or spirit of paragraph 200, which, in other particulars at least, speaks only of timbers of considerable processing other than the mere felling in the forest. We can find nothing in the record so convincing of the contrary as to warrant reversal of the decision of the board. *United States v. Myers & Co.* (4 Ct. Cust. Appls., 431; T. D. 33857); *United States v. Pierce* (147 Fed., 199).

Affirmed.

KAUFMANN & Co. *et al.* v. UNITED STATES (No. 1157).¹

1. HIDES AND SKINS.

There is a recognized distinction between "hides" and "skins" in tariff legislation, hides pertaining to animals of a larger size and skins to smaller animals.

2. ROUGH LEATHER.

The provision for "rough leather" in paragraph 451, tariff act of 1909, was not intended to comprehend the tanned but unfinished skins of small animals.

3. UNSPLIT SEALSKINS, TANNED BUT NOT DRESSED OR FINISHED.

The provision for "rough leather" not applying to these skins of the importation, they fall appropriately under the provision in the paragraph for "all other leather."

United States Court of Customs Appeals, January 29, 1914.

APPEAL from Board of United States General Appraisers, Abstract 30456 (T. D. 32943).
[Affirmed.]

Comstock & Washburn (George J. Puckhafer on the brief) for appellants.

William L. Wemple, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, of counsel; *Charles D. Lawrence*, special attorney, on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MARTIN, Judge, delivered the opinion of the court:

The merchandise involved in the present case consists of unsplit sealskins, which are tanned but not dressed or finished. The merchandise as imported is in an unfinished condition and is unfit for immediate use. After importation it is subjected to various processes

¹ Reported in T. D. 34167 (26 Treas. Dec., 229).

of treatment, whereupon it is used in the manufacture of suit cases, traveling bags, and like articles.

The collector assessed the articles with duty at 15 per cent ad valorem under the provision for "all other leather," contained in the second clause of paragraph 451 of the tariff act of 1909.

The importers duly protested, claiming assessment of the merchandise at 5 per cent ad valorem as "rough leather" under the first clause of the same paragraph.

The protest was submitted upon evidence to the Board of General Appraisers and was sustained. The case was reheard by the board upon the application of the Government, at which time a reexamination of the Government's witness was had. As a result of the rehearing the board overruled the protest and sustained the assessment. From that decision of the board the importers now appeal.

The following is a copy of the relevant parts of paragraph 451 of the tariff act of 1909, subdivided into two parts for convenience of reference in the following decision:

451. (1) Band, bend, or belting leather, rough leather, and sole leather, five per centum ad valorem.

(2) Dressed upper and all other leather, calfskins tanned or tanned and dressed, kangaroo, sheep and goat skins (including lamb and kid skins) dressed and finished, other skins and bookbinders' calfskins, all the foregoing not specially provided for in this section, fifteen per centum ad valorem; chamois skin, twenty per centum ad valorem; skins for morocco, tanned but unfinished, five per centum ad valorem.

It may be repeated that the issue is whether or not the merchandise in question is rough leather, dutiable as such under the first clause of the foregoing paragraph. This is the classification which the importers propose as a substitute for that adopted by the collector at the assessment.

The importers contend that the term "rough leather" covers and includes all leather which is tanned only and not dressed or finished, regardless of the kind of animal or the size of the hide or skin from which it is produced. The importers contend, moreover, that in any event the seal is commonly large enough in size to rank with the walrus, whose hide has repeatedly been held by the board to be rough leather when tanned only and not dressed or finished. Abstract 23769 (T. D. 30820).

The Government, upon the other hand, contends that the term "rough leather" implies two several conditions, first, that the leather in question be tanned only and not dressed or finished; and, second, that the leather be produced from the hides of certain of the larger animals, chiefly cattle of the bovine species, not including the skins of seals. The Government claims that the present importations are properly dutiable at 15 per cent ad valorem under the second clause of paragraph 451, either under the provision for "all other leather," or that for "other skins," and that in either event the protest was rightfully overruled.

The first contention of the importers, as above noted, is that all leather which is tanned only is dutiable as "rough leather," whether it comes from the hide of a large animal or the skin of a small one.

The following testimony upon this issue is taken from the record and is part of the examination of George Wolf, an examiner at the port of New York:

Q. No; I am asking you whether there is a distinction between hides on the one hand and skins on the other?—A. Yes; there is a difference. * * * The term "hides" is applied to animals of the larger size, and the term "skins" applies to the smaller animal.

Q. Is that a distinction that is recent, or have you always recognized it?—A. It is universal in the trade.

Q. Now, I ask you whether the leathers which I have enumerated above in paragraph 451 are leathers made from hides or skins, as you would define them?—A. All leathers of those descriptions are from hides.

The last question and answer relate to band, bend, or belting leather, rough leather, and sole leather, as enumerated in the first clause of paragraph 451.

The statement of the witness that the term "hides" applies to animals of the larger size, and the term "skins" to the smaller animals, is fully sustained by many reported findings and decisions. The Haberman case (T. D. 18739); the Berkovitz case (T. D. 32958); United States v. Helmrath (145 Fed., 36, 37). It is stated with authority in the Haberman decision, *supra*, that the foregoing distinction between hides and skins has been recognized in tariff legislation for more than 40 years. See also United States v. Richards (1 Ct. Cust. Appls., 537; T. D. 31548).

A comparison of the two parts of paragraph 451, above copied, strongly tends to sustain the claim that the first part includes only such leather therein enumerated as is produced from hides as contrasted with skins, leaving the second part of the paragraph to deal with leathers of various kinds produced from the skins of smaller animals.

This construction is especially suggested and supported by the provision for "skins for morocco, tanned but unfinished," which appears at the end of the second part of paragraph 451. In the first part of the paragraph Congress imposes a duty of 5 per cent ad valorem upon all "rough leather." In the second part of the same paragraph Congress imposes a duty of 15 per cent ad valorem upon "all other leather" and upon "other skins." According to the importers' construction the term "rough leather" would itself include all "skins for morocco, tanned but unfinished," and therefore without further provision or specification such skins would be dutiable at 5 per cent ad valorem under the first part of the paragraph. On the other hand, according to the Government's construction such "skins for morocco, tanned but unfinished," being the skins of smaller animals, viz, goats, sheep, and lambs, would be dutiable at the rate of 15 per cent ad valorem under the provision for "other leather"

or "other skins" in the second part of the paragraph. However, at the close of the second part of the paragraph as above divided appears the provision whereby "skins for morocco, tanned but unfinished," are specifically made dutiable at 5 per cent ad valorem. This provision fairly implies a legislative construction of the provisions in question similar to that claimed by the Government. For if tanned but unfinished goat, sheep, and lamb skins were already made dutiable at 5 per cent ad valorem as "rough leather" it was unnecessary again to specify that they should be dutiable at the same rate under the name of "skins for morocco"; whereas on the other hand if such goat, sheep, and lamb skins would have been dutiable at 15 per cent ad valorem as "other leather" or "other skins," the provision for "skins for morocco" would be necessary in order to reduce the duty from 15 to 5 per cent ad valorem. It follows that the contention of the importers denies all force and effect to the provision for "skins for morocco, tanned but unfinished," whereas the Government's construction gives that clause a consistent place among the provisions of the paragraph. This alone seems to be sufficient authority for the conclusion that the provision for "rough leather" in paragraph 451 was not intended or understood by Congress to comprehend the tanned but unfinished skins of small animals, but rather that such skins were covered by the second part of that paragraph, as above copied.

For their second contention, as above noted, the importers argue that sealskins are in any event commonly large enough to be described as "hides of larger animals," and therefore when tanned only should be classified, like walrus hides, as "rough leather" within the paragraph. In answer to this it may be noted that the decisions above cited invariably refer to hides as weighing 12 pounds or more in the dry and skins as weighing less than 12 pounds in the dry. In the present case the court has before it two sample skins taken from the importations and each of these weighs less than 3 pounds. Under the foregoing rule such articles would be skins, not hides. Furthermore the authorities refer to seals in general as furnishing skins, rather than hides, as witness the following definition from the Century Dictionary:

Hide. 2. An animal's skin stripped from its body and used as a material for leather or in other ways—as, a raw *hide*; a dressed *hide*; in the *leather trade*, specifically, the skin of a large animal, as an ox or a horse, as distinguished from *kips*, which are the skins of small or yearling cattle, and *skins*, which are those of small animals, as calves, sheep, goats, seals, etc.

The court therefore concludes that the term "rough leather," appearing in paragraph 451, covers only such tanned and unfinished leather as is derived from the hides of the larger animals, and that the importations do not belong to that class but are included within the opposing category of *skins*.

The decision of the board is *affirmed*.

UNITED STATES v. BRADSHAW & Co. (No. 1196).¹

REAPPRAISEMENT, REVIEW OF.

The collector, acting under instructions from the Treasury Department, refused to adopt a valuation found by three general appraisers upon re-appraisement and assessed duty upon the value found by the local appraiser as affirmed by a single general appraiser. The presumption is that the reappraising board of three acted in accordance with law and there is nothing in the record to overcome this presumption. The appeal must fail.

United States Court of Customs Appeals, January 29, 1914.

APPEAL from Board of United States General Appraisers, Abstract 32681 (T. D. 33511), [Affirmed.]

William L. Wemple, Assistant Attorney General, for the United States.

Stanley Jackson for appellees.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MARTIN, Judge, delivered the opinion of the court:

The importation consists of wool cloth, and the issue relates solely to the dutiable valuation thereof.

Entry of the merchandise was made at the port of San Francisco upon a consular invoice which was duly verified on behalf of A. Comyns & Co., Dublin, who are named in the affidavit as the foreign sellers of the goods. The invoice sets out a number of items which are first totaled; from this total is deducted 10 per cent thereof; the sum thus ascertained is stated to be the true price and market value of the merchandise. The invoice contains no explanation of the deduction just referred to, that item appearing in the following terms: "Less 10% £13 15s. 2d." The importation was entered by the importers at the net valuation thus ascertained and declared.

The local appraiser, however, in passing upon the value of the importation, disallowed the 10 per cent deduction just referred to, and added the same with penalty to the entered value for assessment. This appraisement was appealed to a single general appraiser, who affirmed the appraised value. Thereupon an appeal to re-appraisement was taken by the importers to a board of three general appraisers, and the board sustained the entered value. The present record contains no information concerning the foregoing appeals or the proceedings had thereupon, except only the fact that the appeals were taken and resulted as above stated. And these facts appear only from the official reports of the respective reappraisements filed with the collector.

After the collector had received the report of the reappraising board he received also the following letter of instructions from the Treasury Department:

Protest No. 15618.

TREASURY DEPARTMENT, *July 13, 1912.*

SIR: The department duly received your letter of May 29, 1912, relative to the reappraisement of certain wool cloth covered by entry No. 13437, series of 1911.

¹ Reported in T. D. 34168 (26 Treas. Dec., 232).

It appears that the merchandise was imported by W. R. Bradshaw & Co., who bought the same from A. Comyns & Sons at the value stated in the invoice, amounting to £137 11s. 5d.; that 10 per cent was deducted from this amount and that the entered value was declared at £124 9s. 3d.

The appraiser disallowed the deduction of 10 per cent, and the importers appealed for reappraisalment. A single general appraiser affirmed the appraised value, but upon appeal to a board of three the entered value was sustained.

It appears from your report that the deduction of 10 per cent was for the difference in price between short lengths or cuts and the price of goods in the piece.

You state that the importers admit that they paid the prices stated in the invoice, without the deduction of 10 per cent, but that the 10 per cent deduction should have been added back on entry.

The department is of the opinion that the price stated in the invoice, without the deduction of 10 per cent, represents the foreign market value of short lengths or cuts and that the Board of General Appraisers proceeded in a wrong principle of law in appraising these short lengths at the price of goods in the piece.

You are therefore hereby instructed to liquidate the entry upon the appraised value as found by the local appraiser and a single general appraiser, leaving to the importers their remedy by protest.

The inclosures of your letter are herewith returned.

Respectfully,
(95478.)

JAMES F. CURTIS,
Assistant Secretary.

COLLECTOR OF CUSTOMS, *San Francisco, Cal.*

Acting under the foregoing instructions, the collector refused to adopt the valuation found by the three general appraisers upon re-reappraisalment and assessed duty upon the value found by the local appraiser as affirmed by the single general appraiser.

The importers protested the assessment, the protest reading in part as follows:

The grounds of our objection are that having entered this importation with a deduction of 10 per cent as shown on the invoice, the local appraiser disallowed same and his findings are affirmed by a single general appraiser; whereupon a re-reappraisalment was filed and a hearing had before a board of three general appraisers, in accordance with law, which board sustained the *entered* value. Acting under instructions from the Secretary of the Treasury, dated Washington, July 13, 1912, the findings of the board of three general appraisers was disregarded and the entry was liquidated upon the appraised value as found by the local appraiser and a single general appraiser. A copy of this ruling which resulted in such a liquidation is attached hereto and made a part hereof. We also submit as a part of the record a copy of a letter filed with a single general appraiser and a copy of a letter filed with the board of three general appraisers, and in support of our claim, make special reference to the principles enunciated by the United States Court of Customs Appeals, January 11, 1911, in the matter of *Wolff v. United States* (No. 175), found in T. D. 31217.

The protest was submitted to the Board of General Appraisers and was sustained by the board. The Government now appeals from that decision.

There was no testimony of any kind submitted to the classification board except as above indicated. The present record, therefore, consists of the official files, the letter of the department above copied, the assessment, the protest, two letters written by the importers in the reappraisalment proceedings, and the decision of the classification board now on appeal.

Upon this record the court is constrained to affirm the decision of the board. It must be conceded that the appraisement of the board of three is conclusive upon all parties, until shown to be contrary to law or based upon some erroneous principle. For the presumption is that the reappraising board acted in accordance with law, and this presumption obtains until the contrary is lawfully made to appear. There is nothing in the present record, however, which overcomes the presumption just mentioned, nor are the facts concerning the disputed item disclosed with any degree of certainty. As already stated, the invoice itself contains no explanation of the item in question. The letter of instructions addressed to the collector by the department is not evidence in the case. The letters written by the importers in the reappraisement proceedings are, therefore, all that remain in the record in the nature of evidence concerning the 10 per cent deduction. It is doubtful whether these letters should now be considered as evidence; however, they may be received as admissions of the importers if against their interest.

If any part of these letters should be received as an admission against interest, it will be conceded that all parts thereof relating to the same subject should be considered together. The letters thus considered certainly do not tend to show that the decision of the reappraising board was contrary to law or based upon an erroneous principle. They state in substance that the 10 per cent deduction which appears in the invoice was in the nature of a purchasing commission, the same having been agreed upon in advance as a method of paying the Dublin firm for their services in purchasing, receiving, and forwarding the goods on behalf of the importers. The letters further state that the entered value was in fact the true wholesale market value of the merchandise in the country of exportation. These statements are not contradicted or avoided in any manner in the record, and they tend to show that the item in question was nondutiable. *United States v. Bauer* (3 Ct. Cust. Appls., 343; T. D. 22627). Nor is the statement in the consular invoice that the Dublin firm are sellers of the goods necessarily inconsistent with this conclusion, for nevertheless the circumstances are open to explanation, and part of the ostensible price of the goods may be shown to be a commission. *Case of Alex. Smith & Sons Carpet Co.* (T. D. 24721).

If the importers' letters, therefore, should not be considered, nothing would remain in the record to impeach the finding of the board of three, and the action of the collector would thereupon stand as a bare refusal to accept the appraisement made by that board. If on the other hand the letters should be considered, they would at least not tend to impeach the board's appraisement as proceeding upon a wrong principle.

This conclusion manifestly disposes of the record rather than the issues of law and fact which counsel have argued. Inasmuch, however, as the appeal fails, the decision of the board is *affirmed*. *United States v. Eytinge & Co.* (4 Ct. Cust. Appls., 266; T. D. 33486).

HIRSHBACH & SMITH v. UNITED STATES (No. 1201).¹

ORNAMENTAL PAPER LEAVES OF VARIOUS COLORS.

There is no evidence that this merchandise has been embossed and die cut, but even if there were such evidence, these leaves, simulating natural leaves as they do and being ornamental, are more specifically described in paragraph 438, tariff act of 1909, and they were dutiable thereunder.

United States Court of Customs Appeals, January 29, 1914.

APPEAL from Board of United States General Appraisers, Abstract 32291 (T. D. 33409).

[Affirmed.]

Comstock & Washburn (George J. Puckhafer on the brief) for appellants.

William L. Wemple, Assistant Attorney General (Leland N. Wood, special attorney, on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

BARBER, Judge, delivered the opinion of the court:

The merchandise is truly described in the evidence and in the opinion of the board as paper leaves of various colors. It was assessed for duty under paragraph 438 of the tariff act of 1909, the relevant portion of which relates to—

Artificial or ornamental feathers, fruits, grains, leaves, flowers, and stems or parts thereof, of whatever material composed, not specially provided for in this section.

This assessment was upheld by the Board of General Appraisers.

The importers in this court claim that the merchandise is properly dutiable under paragraph 415 of the same act, the relevant part of which relates to—

Paper embossed, or cut, die-cut, or stamped into designs or shapes, such as initials, monograms, lace, borders, bands, strips, or other forms, * * * not specially provided for in this section.

These leaves are ornamental in appearance and are used by confectioners for trimming or decorating cakes. They simulate natural leaves of various colors. The importers concede they are in the form or shape of leaves and we have no hesitation in saying that in all material respects they so closely simulate the natural product that they must be held to be artificial leaves and so clearly within the provisions of paragraph 438, unless excluded therefrom by what is hereinafter referred to.

It is urged by the importers that they are excluded therefrom because it is said that, generally speaking, the field of operation of that paragraph is in the millinery trade, and it is argued that these leaves are embossed and die cut into their present form. We do not find in the record any evidence tending to show that the merchandise has been embossed and die cut and hardly feel warranted in assuming as a matter of judicial knowledge that they are so. If the importers

¹ Reported in T. D. 34169 (26 Treas. Dec., 235).

would stand upon that claim it was their duty to make proof of the manner of production.

If, however, it were to be assumed that these paper leaves are produced by an embossing or die-cutting process we still think the importers' claim untenable. The descriptive language in paragraph 438, "artificial and ornamental" (and these are both artificial and ornamental) "leaves of whatever material composed," is more explicit than the provision in paragraph 415 for "paper embossed or die cut into shapes" (certain shapes not including leaves being specified) "or other forms." The word "leaves" refers to a particular class of "shapes or forms" and not only more specifically describes them but is the only single word that could be employed to accomplish that result. That it is used with that intention is evidenced by the fact that it is followed by the words "of whatever material composed."

It can not be said that paragraph 438 is wholly limited to millinery articles, for while it relates to many things that are so used it does not make use the test and clearly includes articles which serve other purposes.

The judgment of the Board of General Appraisers is *affirmed*.

UNITED STATES *v.* AMERICAN EXPRESS CO. (No. 1261).¹

CHAMOIS OR CHAMOIS SKIN.

These pieces of chamois or chamois skin, the terms being interchangeable, have not become manufactures of leather by being cut into particular sizes and by having their edges scalloped. They remain chamois or chamois skin and were dutiable as such under paragraph 451 tariff act of 1909.

United States Court of Customs Appeals, January 29, 1914.

APPEAL from Board of United States General Appraisers, Abstract 32274 (T. D. 33578).

[Affirmed.]

William L. Wemple, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, of counsel; *Charles D. Lawrence*, special attorney, on the brief), for the United States.

Comstock & Washburn for appellee.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

BARBER, Judge, delivered the opinion of the court:

The question in this case is whether an importation described in the answer to the protest as "articles of chamois, with cut-out edges, known as face chamois" is dutiable at 40 per cent ad valorem as a manufacture of leather under paragraph 452 of the tariff act of 1909, as assessed, or at 20 per cent ad valorem as "chamois skin" under

¹ Reported in T. D. 34170 (26 Treas. Dec., 237).

paragraph 451, as claimed by the importer and held by the Board of General Appraisers.

The sample of the merchandise used as an exhibit is a small piece of ordinary chamois about 9 by 6½ inches with scalloped edges. The case is here upon the record and files, no parol testimony having been taken by the board. It is unnecessary to quote in full either of the competing paragraphs. Paragraph 452, so far as pertinent, relates to "manufactures of leather not specially provided for" and paragraph 451 to "chamois skin," and if the latter term more specifically describes the merchandise in question than the former, the board should be sustained.

It is well known that originally the term "chamois or chamois skin," as applied to merchandise of this character, related to the skin or some product thereof of the chamois, an animal found in the mountainous districts of Europe and Asia, said to be about the size of a full-grown goat.

We think it is equally now well known that it relates to a soft leather made from various skins, perhaps most often from sheepskin, so tanned, dressed, or prepared that it is very soft and pliable. (See Century and Murray's New English dictionaries.)

As it is commonly understood we think the term "chamois" or "chamois skin," and we also think they are used interchangeably, relates to this kind of tanned and dressed skin often if not generally in pieces smaller than the size of the skin of the animal from which it was originally taken. It is a commodity that is devoted to a multitude of uses. We assume that by the term "face chamois" adopted by the appraiser in his answer to the protest it is implied that the particular importation in his opinion was designed to be used for toilet purposes, but there is nothing about the article itself that limits or confines it to that use and it may equally well be applied to some of the many other uses to which chamois itself is applied.

Whatever may be the use or uses to which it may be applied it is, however, chamois or chamois skin, and therefore specifically provided for in paragraph 451. It has not been manufactured into any of the articles named in paragraph 452 and is in no sense a manufacture of leather thereunder unless the cutting into the particular size in question and the scalloping of the edges be so regarded. We think the operations thereby involved do not have that effect, for, as stated, the article is still chamois or chamois skin within the common understanding of the meaning of that term.

A similar view was adopted by the Board of General Appraisers in G. A. 7425 (T. D. 33143).

The judgment of the Board of General Appraisers ought to be, and it is, *affirmed*.

UNITED STATES *v.* BUSH & Co. *et al.* (No. 1164).¹

WEIGHT OF WIRE—EVIDENCE.

The collector had before him the invoice, the entry, and the weigher's certificate, and it was apparent therefrom that the statement of the gross weight of the wire in the invoice and entry was incorrect and that the true weight less tare, which is the dutiable weight, was before him in the manner required by law. A case of manifest clerical error was thus presented and a shortage in weight of the shipment as invoiced appeared.—*United States v. Nash et al.* (27 Fed. Cas., 750); *Marriott v. Brune* (50 U. S., 633).

United States Court of Customs Appeals, February 5, 1914.

APPEAL from Board of United States General Appraisers, Abstract 31640 (T. D. 33263.)
[Rehearing denied.]

William L. Wemple, Assistant Attorney General, for the United States.

Submitted on record by appellees.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

PER CURIAM: This was an importation of wire. The court held that inasmuch as the weigher's return was a necessary and statutory part of the record before the collector in the official ascertainment of the appropriate rate of duty under the provisions of paragraph 135, it was entitled to and should for that reason receive consideration in the ascertainment of the question whether or not a case of manifest clerical error was presented. *United States v. Swedish Produce Co.* (4 Ct. Cust. Appls., 223; T. D. 33437); *United States v. Wyman & Co.* (4 Ct. Cust. Appls., 264; T. D. 33485); *United States v. National Steam Navigation Co. (Ltd.)* (4 Ct. Cust. Appls., 491; T. D. 33915); *United States v. Proctor Co.* (5 Ct. Cust. Appls., 44; T. D. 34091); *Hampton, jr., & Co. v. United States* (5 Ct. Cust. Appls., 51; T. D. 34093); *Thomsen & Co. v. United States* (5 Ct. Cust. Appls., 69; T. D. 34100).

The Government petitions for a rehearing, alleging that—

No matter how the proviso to paragraph 135 be regarded, whether as strictly a rate-fixing provision or not, this merchandise is actually dutiable at 35 per cent ad valorem. Why it is so dutiable and what preliminary investigation is necessary to determine that it is so dutiable is not important.

The matter which, we respectfully submit, the court overlooked is that this wire was entered at the gross number of pounds for each lot, a lump sum therefor, and a statement as to each lot that it was dutiable at the prescribed rate per pound or at 35 per cent ad valorem, whichever the importer conceived the fact to be. That is to say, the unit of value stated by the importer was the value per lot of wire of the several classes in the shipment which are mentioned in the law. That value was returned correct by the appraiser, and no matter what weights the liquidator had by him, he had no way of knowing what per pound value the importer placed upon the goods.

The importation was of a mixed lot of round steel wire, some in casks and some in bundles. Some of the bundles and casks were of one size and others of another. Some were dutiable at a specific

¹ Reported in T. D. 34187 (26 Treas. Dec., 257).

rate under paragraph 135 and other lots at an ad valorem rate. Each lot was invoiced by weight, unit price, and aggregate price. Each lot was entered by weight, invoice, and dutiable value. It does not appear that the appraiser approved the entered value. On the contrary, the entered weights differ from the invoice weights, all of which, in turn, differ from the weigher's weights, and the appraiser's return simply approved the invoice as "correct." The assumption by the counsel for the Government that "the unit of value stated by the importer was the value per lot of wire of the several classes in the shipment which are mentioned in the law" and "that value was returned correct by the appraiser" is not strictly accurate. The record shows that the goods were invoiced at one weight and at a unit value, while they were entered at another weight at gross value, which differs from the invoice particulars, which latter, and not the former, were adopted as the appraised value by the appraiser. These facts, however, we take to be without controlling importance. [This is not a case wherein the entry controls.] The importation was of wire. The due ascertainment of its dutiable status under the appropriate paragraph of the tariff law (135) required in each case that each lot be weighed. Each lot was duly weighed by the official weigher and his certificate presented to the collector at or before the time of his decision and the assessment of duty. Having before him the invoice, the entry, and the weigher's certificate, it was made apparent therefrom that the statement of the gross weight of the wire in the invoice and entry was incorrect, and that the true weight, less tare, which is the dutiable weight (Rev. Stat., sec. 2898), was before him in the manner required by the law. The record, therefore, presented a case of manifest clerical error, and, further, evidenced a shortage in weight of the shipment as invoiced. The fact that the appraiser adopted the gross invoice value in his appraisal was not binding upon the collector as against the weigher's certificate.

The identical question was long since presented and decided in *United States v. Nash et al.* (27 Fed. Cas., 750; case No. 15856), opinion by Mr. Justice Clifford of the Supreme Court sitting in circuit. That was an importation of tea. It was invoiced at 100,179 pounds, valued at \$38,869. It seems to have been entered as invoiced. It was certainly appraised identically as was this importation, by "writing on the back of the invoice the word 'correct' and signing the same." The weigher's return showed the actual weight to be 103,808 pounds, valued at \$40,279. Of this state of the record Mr. Justice Clifford said:

But ad valorem duties, where they are required to be assessed on a given weight, must be assessed upon the actual weight when landed as ascertained by the proper officer of the customs. Appraisers determine the actual market value or wholesale price of the merchandise in the principal markets of the country from which the

same was imported, but they have no authority to determine the weight or quantity of the importation. * * * Their powers do not authorize them to extend their inquiries beyond what is necessary to enable them to appraise the value of the merchandise as required by law. * * * Such being the case, the collector was bound to adopt that quantity (that returned by the weigher) and the value ascertained by the appraiser as the legal basis for the assessment of the duties.

It will be borne in mind that at that time the statutory requirement that duty could in no instance be taken at less than the entered or invoiced value of the merchandise, whereas at the present time the former of these two requirements is no longer a statutory mandate.

The respective duties of the appraiser and the weigher have been concisely set forth in an opinion by Judge Somerville, speaking for the Board of General Appraisers, in G. A. 5178 (T. D. 23871), wherein it is stated:

The duty of the local appraiser was confined to ascertaining the value per unit of quantity; he had no authority to find the value of the total importation. "The appraisement," says Judge Betts, "must be restricted to determining the price or value of the parcel or quantity by which the purchase and sale of the article are made, and has rightfully no reference to the totality of the purchase." *Manhattan Gas Light Co. v. Maxwell* (2 Blatch., 405; 16 Fed. Cas., 601). And Mr. Justice Woodbury has observed that if appraisers undertake to fix the quantity or weight of imported merchandise "their action in that respect is *coram non jure*, and a nullity." *Mariott v. Brune* (9 How., 634). Of course, these remarks evidently have reference only to cases where the goods are of a kind to be weighed by a United States weigher, for as to other merchandise the appraisers are required to ascertain and estimate "the number of yards, parcels, or quantities." (Sec. 10, act of June 10, 1890.) In the present case the weigher having duly acted, the return of the local appraiser, naming a gross sum as the value of the entire lot of hides, was irregular and improper, and is not to be commended. Indeed, it was not strictly responsive to the collector's request to "report the correct dutiable value" of the invoice. Instead of saying that he found the invoice price per kilo, 1.4954 shillings, to be correct, or stating any other figure as the proper price per kilo, he reported a gross sum (the product of the two factors, the weight of the hides by the price per kilo) as the "actual cost of the merchandise." Thus he avoided finding the one thing he was authorized to find, the market value per unit of quantity, while he apparently approved the weight of the hides as noted on the invoice. As a matter of fact, this weight differed from that of the United States weigher by more than 100 pounds.

The return is objectionable as being ambiguous; but in any event the collector was justified in assessing duty on the invoice price per kilo. If the local appraiser's action be construed as an approval of that price, then it became the appraised value of the hides; while, if the local appraiser is to be understood as having found a lower value for the hides, then such value would not bind the collector, because duty shall not in any case be assessed "upon an amount less than the invoice or entered value." (Sec. 7, act of June 10, 1890.)

And again, in G. A. 5848 (T. D. 25767), speaking for the board Judge Somerville well interpreted the decisions in the following statement:

The law has long been settled to be, and the practice has uniformly followed the rule, that where goods bought and paid for by the ton weight are subject to ad valorem rates of duty the value upon which duty should be assessed is to be determined by multiplying the number of tons and fractions of tons which arrived by the proper value per ton, and upon that amount the duty should be assessed, whether the weight imported was greater or less than the weight specified in the invoice (T. D. 8159).

"The appraisement," says Judge Betts, "must be restricted to determining the price or value of the parcel or quantity by which the purchase and sale of the article are made, and has rightfully no reference to the totality of the purchase." *Manhattan Gas Light Co. v. Maxwell* (2 Blatch., 405; 16 Fed. Cas., 601); *United States v. Nash* (27 Fed. Cas., 750); *Marriott v. Brune* (9 How., 619, 634); *United States v. Southmayd* (*ib.*, 637); *Austin v. Peaslee* (2 Fed. Cas., 235); *Weaver v. Saltonstall* (38 Fed., 439); *Reiss v. Magone* (39 *id.*, 105); *In re American Sugar Refining Co.*, G. A. 4071 (T. D. 16914); *In re Rossbach*, G. A. 5178 (T. D. 23871); *In re Wyman*, G. A. 4529 (T. D. 21525), and T. D. 4502. In *Nash's case*, *supra*, it was observed by Judge Clifford in regard to an importation of tea, then subject to an ad valorem duty, that "ad valorem duties, where they are required to be assessed on a given weight, must be assessed upon the actual weight when landed, as ascertained by the proper officer of the customs. Appraisers determine the actual market value or wholesale price of the merchandise in the principal markets of the country from which the same was imported; but they have no authority to determine the weight or quantity of the importation." In other words, this is the duty of the weigher. *In re Yarnell*, G. A. 3282 (T. D. 16637).

See also in this connection *United States v. Rosenthal* (126 Fed., 766) and *Browne v. United States* (145 Fed., 1).

Since the rendition of the above decisions the law requiring that in no case shall the duty be taken in less than the entered or invoice value has been amended by eliminating the first requirement. In any event such cases of manifest clerical error, as well as of shortage, fall within the statement of the Supreme Court of the United States in *Marriott v. Brune* (9 How., at pp. 633-634), as follows:

But much more should duties not be exacted on what was lost or destroyed on its way hither and which never came even into the possession or control of the custom-house officers, and much less into the use of the community.

Something has been urged in argument on the estimate made by the appraisers, and the final character attached to it. However that may be, if one was made in this case it could be final only as to the price of the sugar abroad and not as to the quantity or weight reaching this country. The latter is fixed by another class of officers, authorized by law for that purpose; and if the appraisers undertake to fix it, their action in that respect is *coram non jndice*, and a nullity.

Petition denied.

UNITED STATES *v.* POST FISH CO. (Nos. 1167 AND 1212).¹

FISH FROM THE CANADIAN WATERS OF LAKE ERIE.

In all essentials the equipment put in place by the importer in the Canadian waters of Lake Erie, or put in place by the importers' orders, constituted an American fishery, and all the fish there taken were the sole property of the importer and the products of an American fishery. There was no requirement of law as to the showing necessary to be made to entitle these fish to free entry other than that they should be the products of American fisheries. This showing could be made before the board after protest had been filed in due form and in due time.

United States Court of Customs Appeals, February 5, 1914.

APPEAL from Board of United States General Appraisers, G. A. 7449 (T. D. 33279), Abstract 32984 (T. D. 33594).

[Affirmed.]

William L. Wemple, Assistant Attorney General, for the United States.

W. E. Guerin, jr., for appellees.

¹ Reported in T. D. 34188 (26 Treas. Dec., 261).

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

SMITH, Judge, delivered the opinion of the court:

In this case fresh fish brought into the port of Sandusky, Ohio, by the Post Fish Co. were assessed for duty at one-fourth of 1 cent per pound as fresh-water fish not provided for under paragraph 271 of the tariff act of 1909, which paragraph reads as follows:

271. Fresh-water fish not specially provided for in this section, one-fourth of one cent per pound.

The importer protested that the fish were the product of an American fishery and that therefore they were entitled to free entry under the provisions of paragraphs 567 and 639 of the free list of the tariff act of 1909, which free list in part reads as follows:

FREE LIST.

That on and after the passage of this act, * * * the articles mentioned in the following paragraphs shall, when imported into the United States, * * * be exempt from duty:

* * * * *
567. Fish, fresh, frozen, or packed in ice, caught in the Great Lakes or other fresh waters by citizens of the United States, and all other fish, the products of American fisheries.

* * * * *
639. * * * Spermaceti, whale, and other fish oils of American fisheries, and all fish and other products of such fisheries; * * *.

Two series of protests were submitted to the board for determination, and the board sustained all the protests of both series. The Government appealed. The two cases based on the two sets of protests are known in this court as suits 1167 and 1212. The record of suit 1167 constitutes a part of the record made up on the hearing of the protests involved in suit 1212, but the facts presented in both cases are substantially the same, with the exception that the affidavits required by Treasury regulations, filed in one case, were not filed in the other.

From the testimony produced at the hearing by the importers it appears that the Post Fish Co. is a corporation organized and existing under the laws of the State of Ohio. The corporation is engaged in the business of catching fish off Pelee Point, in the Canadian waters of Lake Erie, which business has been pursued continuously by the corporation and its American predecessors in interest for a period of some 30 years. The company, or J. W. Post acting for it, furnishes and owns the stakes, nets, fishing tackle, and all necessary equipment for the taking and catching of fish. The concern has established four fisheries on the east side of Pelee Point and three on the west side, by driving stakes into the bed of the lake and attaching to them nets set up in strings or rows and equipped with pounds for trapping fish. The men who drive the stakes, hang the nets, and have charge of the several strings or rows of nets and their corresponding pounds are employed by the company and are charged with the duty of lifting

the fish from the nets and delivering them to the company's steamer, the *Louise*. With the exception of one man, who owns his boat, the men in charge of the nets are furnished by the company with motor boats and are thus enabled to visit the nets.

The motor boats receive the fish as they are lifted from the pounds and deliver them on board the *Louise*, where they are sorted and placed in boxes without segregating the catch of one fisherman from that of another. Fish caught by the Americans Waedel and Grathwohl were kept in separate packages and landed in that condition at Sandusky. As compensation for their services the employees of the company receive either a certain rate per pound or a percentage of the value of the fish caught and delivered, and at their own expense may hire, and do hire, other men to aid them in their work. The employees of the company are charged with responsibility for all property confided to their care, and are bound to return it to the company in as good condition as that in which it was received by them, but they do not rent it in the sense that they pay anything for its use. The employees in charge of the nets are subject to the directions of the captain of the *Louise*, and the fish are left in the nets or lifted therefrom, as he may order. Unless prevented by weather or other contingency the *Louise* calls at the nets every day except Sunday, and taking on board such fish as may have been lifted carries them to Sandusky for entry at the customhouse. This state of facts, which was met by the Government by no competent evidence to the contrary, warranted, we think, a finding that the stakes, nets, pounds, fishing gear, tackle, and other essentials for the taking of fish established by the Post Fish Co. on both sides of Pelee Point were either wholly the property of the Post Fish Co. an American corporation, or property to the use of which the company was entitled, and which was completely subject to its orders, directions, control, and management. From this it follows, under the decided cases, that in all essentials the entire equipment put in place at Pelee Point by the importer or by its orders constituted an American fishery, and that all fish taken by it were the sole property of the Post Fish Co. and the products of an American fishery. T. D. 3131, T. D. 7933, T. D. 24738, T. D. 28768; *Lake Ontario Fish Co. v. United States* (99 Fed., 551-552); *United States v. Reading* (1 Ct. Cust. Appls., 515; T. D. 31534).

The suggestion that the tariff status of fish taken by American fisheries on the Great Lakes should be determined by a different rule from that governing the tariff status of fish caught by American fisheries in salt water does not appeal to us. Possibly the tariff act of 1897 exacted for the free entry of fresh-water fish taken by American fisheries compliance with a condition not required of American salt-water fisheries, but if it did both classes of fisheries, equally

entitled to the favor of the Government, were placed on the same footing by the tariff act of 1909.

Paragraph 555 of the act of 1897 provided for the free entry of—

Fish, fresh, frozen, or packed in ice, caught in the Great Lakes or other fresh waters by citizens of the United States.

That paragraph as it stood was open to the interpretation that only those fish in the catching of which none but American citizens had any intervention were entitled to free admission, and that consequently fish taken by American owned nets, boats, gear, tackle, and equipment—that is to say, by American fisheries—would be excluded from its operation if any but American citizens were employed in making the catch. (*Lake Ontario Fish Co. v. United States, supra.*) A provision so worded and interpreted was clearly to the disadvantage of American fresh-water fisheries, apparently without any compensating return, and that the provision was extended by paragraph 567 of the act of 1909 so as to cover “other” fish than those caught by American citizens evidenced, we think, an intention on the part of Congress to relieve American concerns fishing in the Great Lakes from the obligation of verifying the citizenship of every fisherman employed by them and to give to the products of their enterprise the same advantage as that accorded to fish caught by American citizens possibly neither the owners of a fishery nor engaged in fishing as a business.

The point made by the Government that fish caught by Fred Waedel and William Grathwohl are not entitled to admission free of duty because the boats used in making the catch were hired by them from the owners, Post and Grubb, is not well taken. Fred Waedel and William Grathwohl were both American citizens, and the fish taken by them, which are the subject of protest in suit 1212, if they were not fish caught by the Post Fish Co., an American fishery, were either fish caught by American citizens or fish caught by a fishery of which Fred Waedel and William Grathwohl were the owners, and in either or any of the events they were fish entitled to free entry. It was further claimed by the Government that the entries involved in suit 1167 were not accompanied by the affidavits required by Circular No. 4, issued by the Secretary of the Treasury on January 10, 1912 (T. D. 32138), and that therefore all protests directed to the classification of fish covered by such entries should be overruled for failure to comply with the Treasury regulations. When the fishing season began in April, 1912, the importer presented its entry, accompanied by the affidavits required by the regulations, but was notified by the collector himself that he (the collector) was satisfied that the fish were dutiable and that therefore the affidavits need not be filed. In accordance with this statement of the collector no affidavits were filed with the entries involved in suit 1167, and all

fish covered by such entries were held to be dutiable not because no affidavits were presented with the entries, but apparently on the theory that they were either not taken by American citizens or by an American fishery, or if taken by an American fishery that such fish were not entitled to free entry as "all other fish, the products of American fisheries."

The affidavits prescribed by Circular No. 4 for the free entry of the products of American fisheries were clearly designed for no other purpose than that of furnishing the collector with sufficient information to justify a determination on his part that the importation was within the terms of the free list and therefore entitled to admission free of duty. The collector having satisfied himself from other sources of information that the merchandise was dutiable and not free of duty, and having virtually declared that the affidavits if presented would not change his mind on that subject, it would have been a useless formality to present them, and their presentation must be regarded as waived. But apart from all that, the regulation in question was purely administrative and compliance with it as a condition precedent to the free entry of the fish was not required by the statute. Had the statute prescribed that the nature and character of the importation was to be determined by certain affidavits filed at the time of entry, or had the free entry of the products of American fisheries been conditioned by law on the presentation of such affidavits when entry was made, the goods might very properly be finally denied the favor of the free list. The act under which the importation in controversy was entered prescribed no condition, however, for its free entry other than that it should be fish the products of American fisheries, and proof that they were such products might properly be made before the board after protest filed in due form and time. *United States v. Morris European & American Express Co.* (3 Ct. Cust. Appls., 146-147; T. D. 32386).

The decisions of the Board of General Appraisers in suits 1167 and 1212 are *affirmed*.

DE JONGHE *et al.* v. UNITED STATES (No. 1171).¹

1. CONSTRUCTION.

Words to which Congress has given a special meaning in a tariff act will be presumed to retain that signification in a subsequent tariff act relating to the same subject matter, no contrary intention appearing. *Reiche v. Smythe* (13 Wall., 162). Accordingly snails may not be deemed "live animals."

2. ESCARGOTS OR EDIBLE SNAILS.

Nor, by the same reasoning, can snails be deemed shellfish and entitled to free entry. They are to be classified as a raw article designed to be converted into a food not enumerated or provided for. They were dutiable under paragraph 480, tariff act of 1909.

¹ Reported in T. D. 34189 (26 Treas. Dec., 265).

United States Court of Customs Appeals, February 5, 1914.

APPEAL from Board of United States General Appraisers, Abstract 32075 (T. D. 33348),
Abstract 32338 (T. D. 33409).

[Reversed.]

Comstock & Washburn (George J. Puckhafer on the brief) for appellants.

William L. Wemple, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, of counsel; *Henry H. Childers*, special attorney, on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

SMITH, Judge, delivered the opinion of the court:

This case involves the classification of escargots or edible snails, imported alive, which were subjected to a duty of 20 per cent ad valorem as "live animals" under paragraph 229 of the tariff act of 1909, which paragraph is as follows:

229. All other live animals, not specially provided for in this section, twenty per centum ad valorem.

The importers protested against the classification and the rate of duty applied to the importation by the collector and claimed that the snails were either entitled to free entry as shellfish under paragraph 671 of the free list or dutiable under paragraph 480 as a raw or unmanufactured article not provided for. Paragraphs 671 and 480 are as follows:

FREE LIST.

671. Shrimps and other shellfish.

480. That there shall be levied, collected, and paid on the importation of all raw or unmanufactured articles, not enumerated or provided for in this section, a duty of ten per centum ad valorem, and on all articles manufactured, in whole or in part, not provided for in this section, a duty of twenty per centum ad valorem.

The Board of General Appraisers overruled the protest and the importers appealed.

The first question presented by the record is whether the snails are "live animals" within the meaning of paragraph 229 and consequently dutiable as assessed.

Under section 23 of the act of March 2, 1861, "animals living, of all kinds," and "birds, singing and other, and land and water fowls," were separately provided for and exempted from the payment of duty. While these provisions were still in force and on May 16, 1866, a special act was passed which levied a duty of 20 per cent ad valorem on all "horses, mules, cattle, sheep, hogs, and other *live animals* imported from foreign countries." As the act was limited to the subject of horses, mules, cattle, sheep, hogs, and other *live animals*, the collector of customs at New York considered that it was aimed at all live animals provided for in the free lists of previous acts, and that it was intended to make such animals dutiable instead of free. Accordingly canary birds were classified as live animals and subjected to a

duty of 20 per cent ad valorem. The Supreme Court of the United States declined, however, to sustain the decision of the collector and held, first, that a distinction having been once made by Congress between live animals and birds, that distinction, in the absence of anything to the contrary, would be presumed to have been carried into subsequent legislation on the same subject; and, second, that the word "animals" was used by Congress in its popular signification, and that the expression "animals, living," as employed in the act of 1861, applied to quadrupeds and not to birds or fowls. *Reiche v. Smythe* (13 Wall., 162, 164-165).

The doctrine laid down in the *Reiche* case, that words to which Congress has given a special meaning in a tariff act will be presumed to retain that signification in a subsequent tariff act relating to the same subject matter in the absence of anything showing a contrary intention, was, in effect, reaffirmed in *Robertson v. Rosenthal* (132 U. S., 460, 464).

In the tariff act of 1909, under which these goods were assessed for duty, we find nothing showing that Congress intended to use the expression "live animals" in any other sense than that in which it was used in the tariff acts of 1861 and 1866. Congress must be presumed to have had knowledge of the decision in the *Reiche* case and that the tariff provision for a duty on "other live animals" had been interpreted to mean such animals as were quadrupeds. Nevertheless, in every tariff act from the date of that decision down to and including the tariff act of 1909, Congress continued to impose a duty on live animals and indicated in no way any intention to change the signification put upon the designation "live animals" by the Supreme Court. We must therefore conclude that the judicial interpretation given to that term was approved by Congress and that as snails are not quadrupeds they were not subject to the duty imposed on live animals by paragraph 229. See *Homer v. Collector* (1 Wall., 486, 490).

The same reasoning, however, which excludes snails from the tariff provision for live animals likewise excludes them from classification as shellfish, and consequently from admission to free entry under the provisions of paragraph 671. Paragraph 703 of the act of 1890 provided for the admission free of duty of "shrimps and other shellfish," and paragraph 708 of the same act admitted "snails" to free entry. Paragraphs 615 and 620 of the act of 1894 likewise classified snails and shellfish as separate tariff entities and exempted both from duty. In the acts of 1897 and 1909 no provision was made for the free entry of snails, although shrimps and shellfish were continued on the free list. As snails and shellfish were separately provided for on the free list in the tariff acts of 1890 and 1894, it is evident that snails were not regarded by Congress as shellfish, and that snails and shellfish must be considered as distinct entities for tariff purposes. From this it follows that the designation "shellfish" does not embrace

snails, and that as snails were omitted from the free list of the tariff act of 1909 they must be held to be dutiable and not entitled to free entry. Snails are not provided for *eo nomine* or by description in the dutiable list, and apparently they can not be made dutiable by similitude in material, quality, texture, or use to any enumerated article therein provided for. We think, however, that they may be classified as a raw article, designed to be converted into a food, and not enumerated or provided for. We therefore hold that edible snails are dutiable at 10 per cent ad valorem under the provisions of paragraph 480.

The decision of the Board of General Appraisers is *reversed*.

COLONIAL IMPORT & EXPORT CO. v. UNITED STATES (No. 1178).¹

DURESS—WHAT IS NOT.

The importers had been warned that the entered value of their brierwood was lower than that of other importers and that unless the value was advanced penalties for undervaluation would be exacted. The importers were by this warning required to do nothing more than the law itself obliged; they were subjected to no unlawful demand and consequently to no duress.

United States Court of Customs Appeals, February 5, 1914.

APPEAL from Board of United States General Appraisers, Abstract 31821 (T. D. 33304).

[Affirmed.]

Walter Evans Hampton for appellants.

William L. Wemple, Assistant Attorney General, for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

SMITH, Judge, delivered the opinion of the court:

It appears from the record in this case that about the month of July, 1911, certain brierwood blocks for the making of pipes, imported by the Colonial Import & Export Co. at the port of New York, were passed by the appraiser at their entered value. After the brierwood blocks had been released by the customs officials the examiner, who is charged with the duty of noting on the invoice for the appraiser the value of such goods, sent for one of the importers and in the appraiser's office notified him that the goods had been entered at lower prices than those at which similar goods had been entered by other importers. The examiner further stated that if the company did not advance the value of such goods a penalty might be incurred which would result in a good deal of money loss. To this the representative of the importers responded that the passed goods had been correctly entered and that subsequent importations would be entered at the price paid for them and no more.

In August the Colonial Import & Export Co. imported three additional shipments of brierwood blocks and entered them at the New York customhouse at the invoice value, whereupon the company was notified that the entered value was too low, and that it

¹ Reported in T. D. 34190 (26 Treas. Dec., 268).

would be advanced to a value carrying a high penalty for undervaluation. The advance was made and was followed by an appeal to reappraisement. In October and November, and apparently while the reappraisement proceedings on the August shipments were still pending, two additional shipments of similar merchandise, consigned to the Colonial Import & Export Co. arrived at New York. The October importation was invoiced at 8,604.75 francs, at which sum it was entered, with an addition of 3,594.15 francs to make market value. The November importation was invoiced at 9,368.50 francs, to which was added 4,949.63 francs to make market value. Both additions were made on the basis of the unit value theretofore asserted by the examiner to be the true value and each addition was accompanied by a protest against the payment of duty thereon. In both cases duty was collected on the invoice value as advanced in the entry. The importing company protested that it had been compelled to make the additions under duress to obtain possession of its goods and to avoid the payment of penalties. The Board of General Appraisers overruled the protests and the importers appealed.

Counsel for the appellant argues that the decision of the board should be reversed on the ground that the additions to the entry were made by the importing company under duress and that consequently the entry value certified to the appraiser was not its voluntary act. The duress which it is claimed rendered the entry involuntary and therefore not binding on the importers was not of the kind implying physical compulsion, but rather an improper moral constraint which compelled the importers to submit to an illegal demand in order to obtain possession of their goods. If, therefore, the release of the brierwood blocks by the customs officials was, under color of authority, made conditional on compliance with any unlawful demand or exaction on their part, there was duress, and the appellant is entitled to relief. On the other hand, if no illegal demand was made and the importers were required to do no more than the law obliges, then there was no duress of goods, and the decision of the board should be affirmed.

So far as we are able to gather from the record, the company was simply warned that its entered value of brierwood blocks was lower than that of other importers and that unless the value was advanced penalties for undervaluation might be exacted. The statement made by the examiner that he believed the goods carried a higher market value than that at which they were entered, coupled with the admonition that any undervaluation would result in a penalty, was not a demand or exaction in any sense of the word, but rather a timely notice of his state of mind, which might result in saving penalties on subsequent entries. Far from being an act of oppression, which duress always implies, the warning of the examiner was a friendly act from which no other consequence should have naturally followed than a careful verification of entry values. But if the

statement of the examiner, followed as it was by an advance on the August shipments, could be considered as a demand, it was not an illegal demand. If it can be regarded as a demand at all, which we do not concede, it was a demand which put no moral constraint on the importers to do anything more than right conscience and the law required and left them free to make any entry which they chose.

In making the entries of October and November the importers were no more menaced by the threat of penalties which the law imposes for undervaluation than they were when they entered their goods in July and August, and knowing the actual market value of their goods, as the importers must be presumed to have known it, the statement of such value, as they truly knew it, was just as potent in one month as another to avoid the consequences of undervaluation. In other words, without being told of it by the examiner, they knew in August, as they knew in July, that undervaluation meant penalties, and what they were told by the examiner put them under no more compulsion in making the entries of October and November than did the law itself or the knowledge of the value which they were presumed to have. Had the customs officials declined to receive the entries unless presented in a form which it was illegal to require, or had they demanded that to make market value some item be added which was or might be held lawfully no part of market value, then the importers might well have complained of duress, because release of the imported goods from customs control would have been conditioned on importers' compliance with an unlawful demand. That is not this case, however, and as the importers were required to do nothing more than the law itself obliged, they were subjected to no unlawful demand and consequently to no duress. That there is no duress when a person is subjected to no other compulsion than a demand that he do that which legally he ought to do is sustained by all the authorities to which our attention has been called.

In our opinion none of the cases cited by the appellants sustain their contention. In *Maxwell v. Griswold* (10 How., 241) Griswold, the importer, purchased certain goods in Manila which were invoiced at \$38,197.95, their market value at the time of purchase. The collector of customs at the port of New York asserted that the market value of the goods was not their market value at the time of purchase, but their market value at the time of exportation, and informed Griswold that unless he entered them at the sum of \$47,662.95, their value as of the date of exportation, they would be appraised at that sum in accordance with the rule prevailing in the New York customhouse, and that in consequence the importer would be required to pay penalties in order to get possession of his property. Griswold protested against making any such entry, but made it in order to save forfeiture and additional duties. The court held that the true market value of the goods under the statute was their value as of the date of purchase, and not as of the date of exportation, and that the collector's demand

that the merchandise should be entered at the market value on the date of exportation was an illegal demand which put the importer under duress. In *Robertson v. Frank Bros. Co.* (132 U. S., 17), the importers, in order to make market value, were compelled to add an item for shipping charges, amounting to 140.38 pesos, and also an item for transportation charges, amounting to \$1,465.87. The court held that the shipping charges and transportation charges were not elements of market value and that the requirement of the appraiser that they should be made a part of market value in the entry was illegal and constituted a moral duress which entitled the importers to relief.

In *Stein v. United States* (1 Ct. Cust. Appls., 36; T. D. 31007, and 1 Ct. Cust. Appls., 478; T. D. 31525), it had been the practice of collectors of customs to add $2\frac{1}{2}$ per cent commission on all Bradford goods to make market value. Stein, in making out entries of Bradford goods through his broker, added the item of $2\frac{1}{2}$ per cent to make market value, with the notation that it was added "under duress." The collector refused to accept the entry. The broker then presented an entry with the notation "Add $2\frac{1}{2}$ per cent commission," which was also refused by the collector. An entry was next offered containing the notation "Add $2\frac{1}{2}$ per cent commission to make market value." This entry was likewise rejected by the collector, who insisted that the word "commission" be stricken out. With the knowledge that the appraisers would add the $2\frac{1}{2}$ per cent as a part of market value and that penalties would result from the advance the importers changed the entry to conform to the demands of the collector. This court held that the $2\frac{1}{2}$ per cent commission was a nondutiable item and that the demand of the collector that it should be included for dutiable purposes was an illegal act subject to correction. In all three of these cases it is apparent that the importers were put under constraint to enter as market value something which was not market value at all and that they were therefore subjected to an illegal demand, compliance with which was in effect a condition for the release of their goods and consequently amounted to duress.

The decision of the Board of General Appraisers is *affirmed*.

UNITED STATES *v.* STIRN (No. 1239).¹

PROTEST, SUFFICIENCY OF.

The duty was erroneously computed, the collector applying a size number to the yarn greater than was warranted by the fact, the error proceeding from using the gray instead of the dyed condition of the article as a basis. The yarns, however, were dutiable according to their size number in a dyed condition and the protest as a whole shows that the importers had the correct provision of law in mind and by this the collector's attention was directed to it.—*Carter v. United States* (1 Ct. Cust. Appls., 64; T. D. 31033). *Lichtenstein v. United States* (*ib.*, 79; T. D. 31105); *Oelrichs v. United States* (3 *ib.*, 232; T. D. 32541). *Bowling Green Storage Co. v. United States* (3 *ib.*, 309; T. D. 32588) distinguished.

¹ Reported in T. D. 34191 (26 Treas. Dec., 271).

United States Court of Customs Appeals, February 5, 1914.

APPEAL from Board of United States General Appraisers, Abstract 32977 (T. D. 33594).

[Affirmed.]

William L. Wemple, Assistant Attorney General (*Martin T. Baldwin*, special attorney on the brief), for the United States.

Submitted on record by appellee.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

BARBER, Judge, delivered the opinion of the court:

In this case the importers submit upon the record and finding of the board. Brief and argument are presented by the Government. The merchandise consists of dyed schappe silk yarns and was assessed for duty under the provisions of paragraph 397 of the tariff act of 1909 according to the number of the yarns in the gray or original condition, against which the importers protested.

The Board of General Appraisers, following their prior decision G. A. 7295 (T. D. 32002), held the goods should have been assessed according to the number of the yarns in their dyed condition.

The Government does not otherwise contend, but claims that the protest did not correctly name the size number of the yarn covered by the importation when so ascertained; that, as the duty is finally determined upon the basis of such number, the protest is insufficient, not in form but in substance, and that therefore it ought to have been overruled.

Paragraph 397 is lengthy and relates only to spun silk or schappe silk yarns of various qualities, conditions, and size numbers. Generally speaking it provides for certain ad valorem rates depending upon quality, condition, size number, and value, and in addition a specific duty of ten one-hundredths of 1 cent per number per pound if the size number does not exceed 205, while if it exceeds that figure the specific additional duty is fifteen one-hundredths of 1 cent per number per pound.

The only provision in the paragraph for an ad valorem rate of 70 cents per pound and a specific additional duty of one-tenth of 1 cent per size number per pound if not above 205 and 15 one-hundredths of 1 cent per size number per pound if above 205 is found near the close of the paragraph, and we quote the same:

If advanced beyond the condition of singles by grouping or twisting two or more yarns together, on all numbers up to and including two hundred and five, seventy cents per pound, and in addition thereto ten one-hundredths of one cent per number per pound; on all numbers exceeding number two hundred and five, seventy cents per pound, and in addition thereto fifteen one-hundredths of one cent per number per pound.

The material part of the protest is as follows:

We claim said merchandise is spun silk No. 250/2 ply colors and on beams, and dutiable at 70 cents per pound and fifteen one-hundredths of a cent per number under paragraph 397.

As we understand, it is found by the Board of General Appraisers and conceded by the Government that the yarn in this particular protest is properly dutiable under the quoted part of the paragraph. It was assessed thereunder, but the duty was erroneously computed because the collector applied a size number to the yarn greater than in fact it was, for that he assumed it to be based upon the gray instead of the dyed condition.

No testimony was taken before the board. It appears from the record that the merchandise was sent to the appraiser's office for the ascertainment of the correct size numbers. Those reported applicable to dyed and colored yarns were found by the board to be the proper numbers thereof for the assessment of duties, a stipulation having been entered into by counsel for the importers and the Government that such numbers should be taken as the numbers to be used in reliquidating the entries. From that schedule it appears that the size numbers of the merchandise covered by the above protest were 261 and 269, and hence it is true that the protest did not correctly designate the number of the yarns.

The Government in its brief construes the protest as "a claim that the silk is two-ply colored yarn of number 250 and dutiable accordingly," and calls attention only to the fact that the correct number was 261. Its claim, therefore, as to the particular protest reduces to this, that it is insufficient in substance because the importers named a specific number which they said under paragraph 397 was the correct number of the yarn, while the proof shows the number so selected was incorrect.

Does this make the protest insufficient in substance, as claimed by the Government?

In *Arthur v. Morgan* (112 U. S., 495), it was said that—

A protest * * * is sufficient if it shows fairly that the objection afterwards made at the trial was in the mind of the party and was brought to the knowledge of the collector, so as to secure to the Government the practical advantage which the statute was designed to secure.

In the case of *Carter v. United States* (1 Ct. Cust. Appls., 64; T. D. 31033), that rule was followed and many other cases upon the before somewhat vexed question as to the sufficiency of protests were cited and reviewed by Montgomery, Presiding Judge.

Again, in *Lichtenstein v. United States* (1 Ct. Cust. Appls., 79; T. D. 31105), the question of the sufficiency of protest was before this court and by the same judge it was said for the court that it was not essential that the importer in the protest should "hit the bird in the eye," but that he should state his claim with sufficient clearness and certainty to acquaint the collector with the general ground of his complaint.

The principle of these decisions has never been departed from, so far as we are aware, by the court. See *Bliven v. United States* (1 Ct.

Cust. Appls., 205; T. D. 31239); *Oelrichs v. United States* (3 Ct. Cust. Appls., 232; T. D. 32541).

Tested by the above rule we think the protest was sufficient and should be sustained.

It is against the assessment made upon the basis of the size number in the gray. It calls attention to the fact that the silk is colored and dutiable at 70 cents per pound and 15 one-hundredths of 1 cent per number per pound under paragraph 397. The said number 250 was erroneously selected as representing the yarn, but the selection of number 250 did not lead the collector away from the proper clause of the paragraph because that number is one that might come thereunder, while by selecting the ad valorem rate of 70 cents per pound and the specific rate of fifteen one-hundredths of 1 cent per number per pound, both of which are claimed in the protest, the collector's attention is directed explicitly to the proper clause of the paragraph, because it is the only one therein which provides for such ad valorem and specific rates. If no size number had been mentioned it could not be urged that the collector was thereby misled, and we do not think the fact that an erroneous one was claimed has that effect. The protest as a whole shows that the importers had the correct provision of law in mind when it was filed, and by it the collector's attention was thereto directed.

It is not like the case of *Bowling Green Storage Co. v. United States* (3 Ct. Cust. Appls., 309; T. D. 32588), much relied upon by the Government, where the importer by his explicit protest claim under one provision of paragraph 717 was held to have excluded a claim under another provision thereof, because, as was held in that case, he had limited himself to a part of the paragraph which was inapplicable.

The importers here have sustained their claim that the yarns were dutiable according to their size number in a dyed condition, and the protest is sufficient to entitle them to reliquidation accordingly.

What we have said relates principally to the appeal in protest 518802. It is the only protest embodied in the record and the one to which the argument for the Government is in the main directed. It is claimed, however, that similar infirmities exist in each of the nine other protests involved in this case. We so assume, and so far as similar objections are made thereto think they should be likewise disposed of.

In addition, however, it is pointed out in the Government's brief that in respect to two of these other protests, one refers to paragraph 299 and the other to paragraph 399, instead of to paragraph 397, and it is urged that this inaccurate reference warrants the holding that such protests are insufficient. Paragraph 299 relates to vinegars and paragraph 399 to velvets, chenilles, pile fabrics, etc.

It is obvious that the collector could not have been misled by the reference to these paragraphs. A consideration thereof for an in-

stant would have suggested to him their inapplicability, while, on the other hand, by the protest claim that the merchandise was spun silk and by the reference to the duty rates provided therefor only in paragraph 397 the collector's attention was directed to the proper part of that paragraph. This showed that such paragraph only and not the ones referred to by said erroneous numbers was really the one invoked. *Shaw v. United States* (122 Fed., 443).

It should also be noted that in each instance the size number selected in a protest, although erroneous, is not greater than 205 wherever the true number was found not to exceed it, and is more than 205 in all cases where it was so found.

The judgment of the Board of General Appraisers sustaining the protests so far as they were sustained thereby is *affirmed*.

UNITED STATES *v.* KURTZ, STUBÖECK & Co. (No. 1243).¹

1. COLLATERAL ATTACK.

The Board of General Appraisers is a judicial tribunal, clothed with judicial powers to determine the classification of imported goods and the rate of duty thereon, and its decisions on questions of classification or rates are open only to direct and not collateral attack by parties to the proceedings.

2. MATERIALS FOR STRAW HATS OTHER THAN PLATEAUX.

The board's authority was complete, and this had been properly invoke The board was charged with the duty, and it had the power, to decide not a one the main issue concerning plateaux, but every other question of law or fact material in determining the case. The collector was without warrant of law in disregarding the board's decision.

United States Court of Customs Appeals, February 5, 1914.

APPEAL from Board of United States General Appraisers, G. A. 7478 (T. D. 33618).

[Affirmed.]

William L. Wemple, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, of counsel; *Henry H. Childers*, special attorney, on the brief), for the United States.

Comstock & Washburn for appellees.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

SMITH, Judge, delivered the opinion of the court:

In February, 1894, certain materials for the making of straw hats were assessed for duty by the collector of customs at the port of New York at 30 per cent ad valorem as manufactures of straw under paragraph 460 of the tariff act of 1890. The importers objected to the classification of the goods and the duty assessed thereon and accordingly presented to the collector in due time the following protest:

NEW YORK, 20 Feb., 1894.

COLLECTOR OF CUSTOMS, Port of New York:

SIR: We hereby protest against your decision assessing duty at 30% on certain plateaux of straw covered by entry below named. The ground of objection is that

¹ Reported in T. D. 34192 (26 Treas. Dec., 275).

said merchandise consists of circular discs composed of straw continuously woven and intended solely for the ornamentation of hats and is free of duty under paragraph 518, Act 1, Oct./90, "braid, plait, or similar manufacture composed of straw, chip, grass, etc., suitable for making and ornamenting hats," and Treasury Decision 12039, G. A. 952 of 16 Oct./91, admitting similar goods free of duty under above provision of law.

We pay the excess under compulsion solely to obtain possession of said merchandise.

Entry No. 7180. Vessel *Fulda*. Entered 11 Jan./94. Bond No. 14177. Liquidated 13 Feb./94. Marks and Nos., K T S 529/38, 10 cases and various.

Respectfully,

(Signed)

KURTZ, STUBÖCK & Co.

Per CHAS. G. HANKS, *Atty.*

The Board of General Appraisers heard the protest, and on January 4, 1902, sustained it as to all woven or braided pieces of material composed of straw, chip, or grass intended for finishing into hats, designated on the invoices as Capellines, Monachini, Bambini, Plateaux, Rush hats, Manila hats, Java or Java hats or Chapeaux Java or Java Chapeaux, Bamboo straw hats, or Chapeaux de Paille. Because of this decision the collector, on March 25, 1902, reliquidated the entry as to the merchandise designated as "plateaux" and found in the 10 cases marked "K T S 529-38," but declined to reliquidate it as to similar goods designated by other names in the decision and contained in other cases. This ruling of the collector brought forth a second protest from the importers, in which it was claimed that the braids, plaits, and similar merchandise covered by importers' entries and invoices were free of duty and that the collector's reliquidation had not been made in accordance with the board's decision. This protest was forwarded by the collector to the board for determination in May, 1912, some 10 years after it was made, and, having been heard, was sustained.

The Government appealed and now contends that the original protest filed was directed to the "plateaux" contained in cases 529-38, and that the board had no power to order a reliquidation of any other merchandise than that covered by the specific claim of the protest. This objection of the Government is in effect a claim that the board had no jurisdiction under the original protest to make a decision as to any merchandise save and except that designated by the name of "plateaux" and that, therefore, its decision as to similar merchandise, but bearing a different name, was wholly void and without binding effect on the collector. We can not agree that the decision of the board was wholly void as to all merchandise designated in such decision by names other than "plateaux." The board was clothed by law with authority to determine the classification of imported merchandise, and once that authority was invoked by a protest filed with the collector, the board acquired jurisdiction of the parties to the dispute and the power to determine the controversy. Jurisdiction of the subject matter of the controversy and of the parties necessarily carried with it not only the power to decide the

main issue, but also every question of law or fact material for the proper determination of the case. At first instance it was therefore for the Board of General Appraisers to say what particular merchandise was covered by the protest of the importers and whether that document called for a review of the classification of 10 cases of plateaux or of 10 cases of plateaux and 37 cases of similar merchandise bearing other names. The classification not only of plateaux, but of all similar merchandise included in the entry having been determined by the board, that tribunal must be presumed to have held that the protest was broad enough to embrace the merchandise so classified. Such a conclusion on the part of the board may have been erroneous, but whether it was or not could be determined only by an appeal or by some other appropriate proceeding directly attacking the validity of the decision. Both the importers and the Government had full notice of the decision of the board and of the fact that it was directed not only to plateaux, but to all merchandise of a like character. If either party felt aggrieved or believed the decision to be incorrect, relief might have been had by applying for a rehearing or by appeal to the courts. (Secs. 12, 14, and 29, act of 1909.)

As neither remedy was sought, the decision became final and conclusive on all parties, and it accordingly became the duty of the collector of customs to reliquidate the entry in conformity with the direction of the Board of General Appraisers. (Sec. 14, act of 1909.) At the very most the decision of the board was voidable, not void, and advantage not having been taken of the remedies provided by law for the correction of erroneous or voidable decisions it did not lie with the collector to constitute himself an appellate tribunal to determine the validity of the board's mandate to him, and thus avoid the effect of a decision which the board had jurisdiction to make and which, by operation of law, had become final and definitely decisive of the rights of the parties. The Board of General Appraisers is a judicial tribunal, clothed with judicial powers to determine the classification of imported goods and the duty which should be imposed thereon. *Marine v. Lyon* (65 Fed., 992, 994); *Stone v. Whitridge* (129 Fed., 33, 36). Once the board has been called upon to exercise its jurisdiction for the settlement of a controversy as to the classification or the rate of duty which the merchandise should bear, its decisions are open only to direct and not to collateral attack by the parties to the proceeding. (Sec. 14, act of 1909.) The board having been vested with jurisdiction to make a decision, no error which it might make in reaching its conclusion would render the decision void or open the judgment to collateral attack. Sec. 14, act of 1909; *McGoon v. Scales* (9 Wall., 23, 30). The board may have mistaken the law or misjudged the facts, but its adjudication once made was binding upon all the

parties until set aside either on rehearing or by the proper appellate tribunal. *Gray v. Brignardello* (1 Wall., 627, 634); *Voorhees v. United States Bank* (10 Pet., 449, 473).

The decision of the Board of General Appraisers is *affirmed*.

UNITED STATES v. STRAUS & SONS *et al.* (No. 954). STRAUS & SONS *et al.* v. UNITED STATES (No. 965).¹

PROTEST—FUNCTION OF.

A protest serves the purpose not only of a notice to the collector of alleged errors in his classification or assessment so that he may correct his decision if so minded, but as well the purpose of an appeal to the Board of General Appraisers in case the collector declines or fails to make his decision conform to the protest. And once the limit fixed by the regulations within which the collector must pass upon the protest, namely, 30 days, has expired, the jurisdiction of the Board of General Appraisers attaches and the authority of the collector in the premises is suspended, and this whether the papers have been transmitted or not.—*Gulbenkian v. Stranahan* (158 Fed., 836) distinguished.

United States Court of Customs Appeals, February 10, 1914.

APPEAL from Board of United States General Appraisers, G. A. 7370 (T. D. 32581).

[Affirmed.]

William L. Wemple, Assistant Attorney General (*Frank L. Lawrence*, special attorney, on the brief), for the United States.

Walden & Webster for Straus & Sons.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

SMITH, Judge, delivered the opinion of the court:

Five consignments of earthenware, known as Carmelite ware, were severally entered at the New York customhouse on October 5, 1909, October 21, 1909, November 11, 1909, January 6, 1910, and March 7, 1910. The collector of customs classified the merchandise as brown earthenware covered with a transparent vitrified glaze, and assessed it for duty at 55 per cent ad valorem under the provisions of paragraph 94 of the tariff act of 1909, which paragraph reads as follows:

94. China, porcelain, parian, bisque, earthen, stone and crockery ware, plain white, plain brown, including clock cases with or without movements, pill tiles, plaques, ornaments, toys, charms, vases, statues, statuettes, mugs, cups, steins, and lamps, all the foregoing wholly or in chief value of such ware, not painted, colored, tinted, stained, enameled, gilded, printed, or ornamented or decorated in any manner; and manufactures in chief value of such ware not specially provided for in this section, fifty-five per centum ad valorem.

The importers were not satisfied with the decision of the collector and accordingly filed with him in due time their protests claiming a lower rate of duty. The collector did not forward the protests to the Board of General Appraisers for hearing and determination, but retained them, evidently awaiting a decision of the board on like protests which were then pending before that body. When the board

¹ Reported in T. D. 34193 (26 Treas. Dec., 278).

announced its decision in T. D. 30543 that goods such as those involved in the protests were dutiable as enameled earthenware at 60 per cent ad valorem under the provisions of paragraph 93, the collector, through his deputy, directed the appraiser, under date of September 8, 1910, to make a further report on the merchandise covered by the suspended protests. On January 9, 1911, the appraiser reported that—

In view of G. A. 7009 (T. D. 30543), the merchandise in question would now be returned for duty at 60 per cent under paragraph 93.

In accordance with that report the entries were reliquidated on March 3, 1911, to which action the importers entered their protests, claiming first, that the goods were dutiable at lower rates than 55 per cent ad valorem, and, second, that inasmuch as the reliquidation had taken place more than a year after entry no higher rate of duty than that at which the goods were originally liquidated could be exacted. As a result of the protest against reliquidation all protests, papers, and exhibits were forwarded by the collector to the Board of General Appraisers for hearing and determination.

From the original report of the appraiser, dated April 9, 1910, it appears that the merchandise is a glazed earthenware, known as Carmelite ware, dutiable, as appears from his supplementary report of January 9, 1911, at 60 per cent ad valorem, in accordance with T. D. 30543. No evidence was introduced on the hearing and counsel for the importers admit that the merchandise is earthenware similar to that passed upon by this court in *Frank v. United States* (2 Ct. Cust. Appls., 85; T. D. 31633), in which case it was held that such goods were dutiable at 60 per cent ad valorem.

At the time that the reliquidation was made there was pending a protest against the original liquidation to which the collector had not acceded. The first question to be determined, therefore, is whether, with a protest pending and undecided by the board, the collector had authority to make a reliquidation along lines not covered by the protest, and thereby invalidate not only the protest but also the appeal which it effectuated to the Board of General Appraisers.

Subsection 14 of section 28 of the tariff act of 1909 provides that the decision of the collector as to the rate and amount of duties chargeable upon imported merchandise shall be final and conclusive unless the importer gives notice in writing of his dissatisfaction to the collector, setting forth therein distinctly and specifically the reasons for his objections to such decision. Upon such notice and the payment of the duties and charges the collector is required by the same provision to transmit the invoice and all the papers and exhibits connected therewith to the Board of General Appraisers for due assignment and determination. Under the Customs Regulations it is the duty of the collector and naval officer when the protest is received to review the official action taken upon the entry, and if the

collector be satisfied that the claim of the importer is a valid one he may, in conjunction with the naval officer, *reliquidate the entry in accordance with the protest and send a statement of the facts to the Board of General Appraisers.* (Customs Regulations, 1908, art. 1072.) If, on the other hand, the collector does not regard the protest as well taken he is required by the Customs Regulations to transmit, within 30 days from the date of his decision, the protest, invoice, and all the papers and exhibits connected therewith to the Board of General Appraisers. (Customs Regulations, 1908, art. 1073.)

Reading the statute and Customs Regulations together, we think it evident that the protest serves the purpose not only of a notice to the collector of alleged errors in his classification or assessment so that he may correct his decision in conformity with the protest should he be so minded, but also of an appeal to the Board of General Appraisers in case the collector declines or fails to make his decision conform to the protest. See *Gulbenkian v. Stranahan* (158 Fed., 836-838).

To determine whether he will sustain the importer's objections or stand on his original liquidation the collector must of course retain the protest, invoice, papers, and exhibits for a reasonable time, and while he lawfully retains them it may be said that he has his decision under review and that the appellate jurisdiction of the board does not attach. When, however, the collector declines to admit the validity of the protest and the period during which he may properly retain the protest, invoice, papers, and exhibits has passed, the Board of General Appraisers acquires jurisdiction to decide the controversy and the power and authority of the collector over the subject matter is suspended pending decision by that tribunal.

It is true that no time is fixed by subsection 14 for his consideration of the protest or the review of his decision or for his retention of the papers. The Customs Regulations supply that deficiency, however, by making it obligatory upon the collector to transmit the record within 30 days after protest to the Board of General Appraisers, unless he regards the protest as valid. Such a regulation was within the power of the Secretary of the Treasury to make, and as it is not inconsistent with any law in force applicable to the case, and is not shown to be unreasonable, we must hold, first, that it was the collector's duty to forward the protest and papers within the period specified by the regulation—*Kendall v. Lyman* (161 Fed., 652); and, second, that his jurisdiction of the subject matter was limited to the time prescribed for his retention of the record. Of course, by forwarding the papers and thus indicating his adherence to his decision and refusal to accede to the protest, the collector may divest himself of jurisdiction *within* the 30 days, but once the 30 days have passed, whether the papers have been transmitted or not, the appeal is perfected, the jurisdiction of the Board of General Appraisers attaches, and the authority of the collector is suspended pending the

decision of the appellate tribunal. Any other holding in this matter would simply mean that the collector of customs, by violating his duty and retaining the protest, could deprive the importer of a speedy adjudication of his appeal and impede the Board of General Appraisers in the exercise of the jurisdiction with which it is vested once the collector has failed to recognize the protest as just. *In re Bolognesi* (T. D. 26414); *In re Benziger Bros.* (T. D. 26898). Indeed, that Congress recognized that the pendency of a protest suspended the authority of the collector to reliquidate seems fairly inferable from the fact that it excluded protested cases from the operation of the statute making the original liquidation final and conclusive on all parties one year after entry. (Sec. 21, act of June 22, 1874.)

In some cases a reliquidation not on grounds covered by the protest has been sustained by the courts, notwithstanding the fact that the protest of the importers was still in the hands of the collector at the time the reliquidation was made. *Gulbenkian v. Stranahan* (158 Fed., 836). In those cases, however, the reliquidation was had under order from the Secretary of the Treasury by virtue of section 25 of the act of August 27, 1894, and we think that such cases are not pertinent to the issues raised by the protest now under consideration. Section 25 reads as follows:

SEC. 25. That the value of foreign coin as expressed in the money of account of the United States shall be that of the pure metal of such coin of standard value; and the values of the standard coins in circulation of the various nations of the world shall be estimated quarterly by the Director of the Mint, and be proclaimed by the Secretary of the Treasury immediately after the passage of this act and thereafter quarterly on the first day of January, April, July, and October in each year. And the values so proclaimed shall be followed in estimating the value of all foreign merchandise exported to the United States during the quarter for which the value is proclaimed, and the date of the consular certification of any invoice shall, for the purposes of this section, be considered the date of exportation: *Provided*, That the Secretary of the Treasury may order the reliquidation of any entry at a different value, whenever satisfactory evidence shall be produced to him showing that the value in United States currency of the foreign money specified in the invoice was, at the date of certification, at least ten per centum more or less than the value proclaimed during the quarter in which the consular certification occurred.

Whether the power conferred upon the Secretary by the proviso to that section is subject to the provisions of the act of June 22, 1874, making the settlement of duties and free admission of goods final and conclusive upon all parties after the expiration of one year from the date of entry, we are not prepared to say at this time. We think it certain, however, that under the proviso the action of the Secretary, unless barred by the time limit, is conclusive when he proclaims the value in United States money of foreign currency and that his decision as to such value is not subject to review. *Klumpp v. Thomas* (162 Fed., 853-855); *Cramer v. Arthur* (102 U. S., 612, 616-617); *Hadden v. Merritt* (115 U. S., 25, 27-28); *United States v. Klingenberg* (153 U. S., 93, 100-101); *United States v. Whitridge* (197 U. S., 135, 146).

In our opinion the special jurisdiction vested in the Secretary of the Treasury by section 25 is exclusive and may be exercised wholly without regard to the pendency of a protest and without respect to whether such protest is in the hands of the collector or has passed to the custody of the Board of General Appraisers. In other words, the determination of foreign currency values lies with the Secretary of the Treasury and not with the collector or with the Board of General Appraisers, and consequently a reliquidation ordered in conformity with section 25 of the act of August 27, 1894, must follow irrespective of the pendency of the protest or where it is pending.

We are, therefore, of the opinion that decisions had under the provisions of that section are not applicable to this case, in which no question of foreign currency is involved, and that the board very properly sustained the protest of the importers to the collector's reliquidation made by him after he had lost and the board had acquired jurisdiction of the subject matter.

The goods in controversy are admittedly similar to those passed upon by this court in *Frank v. United States* (2 Ct. Cust. Appls., 85; T. D. 31633), and held to be dutiable at 60 per cent ad valorem. We must, therefore, rule that the protest of the importers claiming the merchandise to be dutiable at less than 55 per cent ad valorem, the rate assessed by the collector, was not well taken and that it was properly overruled by the board without affirming the action of the collector.

The decision of the Board of General Appraisers is *affirmed*.

UNITED STATES *v.* VITELLI & SON (No. 1084).¹

1. SECTION 21, ACT OF 1874.

There is no limitation fixed by section 21, act of 1874, except a limitation which arises only in the absence of fraud and in the absence of protest. So far as the section contains implied authority for reliquidation, it imports the right to reliquidate in case of fraud and in case of protest after the lapse of one year equally with the right so to reliquidate within the period of a year.

2. RELIQUIDATION—FRAUD—BURDEN OF PROOF.

The collector found the existence of fraud as a fact. It was not incumbent on the Government in the first instance to introduce evidence tending to support the correctness of the reliquidation by the collector on the ground of fraud. In this case, as in others, the burden was placed on the importer to show by proof that the collector's action was erroneous.

United States Court of Customs Appeals, February 10, 1914.

APPEAL from Board of United States General Appraisers, G. A. 7418 (T. D. 33115).

[Reversed.]

William L. Wemple, Assistant Attorney General, for the United States.

Albert M. Yuzzolino for appellees.

James M. Beck and *Joseph W. Carroll*, amici curiæ.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

BARBER, Judge, delivered the opinion of the court:

In 1905, 1906, and 1907, 14 separate entries were made by the importers of chestnuts and garlic. Liquidation was had by the col-

¹ Reported in T. D. 34194 (26 Treas. Dec., 282).

lector and the duties imposed paid. On July 8, 1912, an order was made by the collector stating that satisfactory evidence having been produced showing that the returns of weights on the importations in question were false and fraudulent, the liquidations were declared void and a reliquidation directed on the basis of the corrected returns made by the United States weigher. The reliquidation was had and protest was filed with the collector and an appeal taken to the Board of General Appraisers, which sustained the protest on the ground that in the hearing had before the board the Government had not supported the claim of fraud by proof, and that it was incumbent upon the collector to establish this fraud by competent evidence, and that a presumption of fraud could not arise from the official action of the collector in reliquidating the entries. From this decision the Government took an appeal to this court.

Subsequently to the hearing a brief has been filed by permission of counsel intervening *amici curiæ*, and the contention is made in this brief that while the Board of General Appraisers reached the correct conclusion, it was in error in assuming that the collector, in reliquidating after the lapse of a year, acted in the discharge of a right granted or duty imposed by law, and that no reliquidation can be had after the lapse of one year.

The board construed section 21 of the act of 1874 as authorizing a reliquidation at any time during one year from the time of entry, and as also authorizing a reliquidation after the lapse of one year in case of fraud or in case of a pending protest.

This section provides:

That whenever * * * duties upon any imported goods, wares, and merchandise shall have been liquidated and paid, and such goods, wares, and merchandise shall have been delivered to the owner * * * such entry and passage free of duty and such settlement of duty shall, after the expiration of one year from the time of entry, in the absence of fraud and in the absence of protest by the owner, importer, agent, or consignee, be final and conclusive upon all parties.

This section is to be construed in connection with subsection 14 of the act of August 5, 1909, which provides:

That the decision of the collector as to the rate and amount of duties chargeable upon imported merchandise, including all dutiable costs and charges, and as to all fees and exactions of whatever character (except duties on tonnage), shall be final and conclusive against all persons interested therein, unless the owner, importer, consignee, or agent of such merchandise, or the person paying such fees, charges, and exactions other than duties, shall, within 15 days after but not before such ascertainment and liquidation of duties, as well in cases of merchandise entered in bond as for consumption, or within 15 days after the payment of such fees, charges, and exactions, if dissatisfied with such decision, give notice in writing to the collector, setting forth therein distinctly and specifically, and in respect to each entry or payment, the reasons for his objections thereto, and if the merchandise is entered for consumption shall pay the full amount of the duties and charges ascertained to be due thereon. * * *

This section was enacted in lieu of section 2931 of the Revised Statutes, which, as it relates to the question here involved, was in substantially the same terms. That section provided that—

On the entry of any * * * merchandise, the decision of the collector of customs at the port of importation and entry, as to the rate and amount of duties to be paid * * * on such merchandise, and the dutiable costs and charges thereon, shall be final and conclusive against all persons interested therein, unless the owner * * * importer, consignee, or agent of the merchandise * * * shall, within 10 days after the ascertainment and liquidation of the duties by the proper officers of the customs * * * give notice in writing to the collector on each entry, if dissatisfied with his decision, setting forth therein, distinctly and specifically, the grounds of his objection thereto, and shall, within 30 days after the date of such ascertainment and liquidation, appeal therefrom to the Secretary of the Treasury.

These two provisions were first considered by the courts in 1879, and in an opinion by Blatchford, Circuit Judge, in *United States v. Phelps et al.* (17 Blatch., 321; Fed. Cas., No. 16039), it was said:

By section 2931 of the Revised Statutes the decision of the collector, in liquidating duties, as to the amount of duties on imported goods, is made final and conclusive against all persons interested in such goods, unless notice in writing of dissatisfaction with such decision is given to the collector, by the importer, within 10 days after the liquidation, and unless within 30 days after the liquidation there is an appeal by the importer from the liquidation to the Secretary of the Treasury. Such liquidation is not made final and conclusive as against the United States. There is nothing in the section which forbids a reliquidation or a new decision by the collector, even after the payment of all the duties fixed by a proper liquidation, or even after the refunding of money deposited beyond the amount of duties so fixed; or which forbids a new decision by the collector as to the law on the same facts, or a new decision as to facts, based on additional or new or different facts. This view is confirmed by the enactment of section 21 of the act of June 22, 1874 (18 Stat. 190), which is as follows:

Whenever any goods, wares, and merchandise shall have been entered and passed free of duty, and whenever duties upon any imported goods, wares, and merchandise shall have been delivered to the owner, importer, agent, or consignee, such entry and passage free of duty and such settlement of duties shall, after the expiration of one year from the time of entry, in the absence of fraud and in the absence of protest by the owner, importer, agent, or consignee, be final and conclusive upon all parties.

This provision was in force when the transactions in this case took place. It applies to the United States. The expression "all parties" includes the United States. By section 2931 of the Revised Statutes, there was no limitation imposed on the power of the collector to reliquidate, when such reliquidation was in the interest of the Government. But by section 21 of the act of 1874 a limitation is imposed on such power, so that, after the entry of goods, and after the liquidation and payment of duties on them, and after the delivery of the goods to the importer, such settlement of duties, if there be no fraud and no protest by the importer, is, after one year from the entry, final and conclusive, even as respects the Government. In the present case, the suit was brought before the one year expired. The collector, therefore, had power to make the reliquidation of July 20, 1878. * * *

This case has not only been frequently followed, but the paragraph providing as to cases in which the first liquidation of the collector shall be final has been twice reenacted and is now embodied in subsection 14 above quoted.

The cases which recognize and follow the case of *United States v. Phelps* are some of them referred to in *Hawley & Letzerich v. United States* (3 Ct. Cust. Appls., 456; T. D. 33037), and are collected in the case *In re Forbes & Wallace* (T. D. 23655) there cited. See also *Louisville Pillow Co. v. United States* (144 Fed., 386) and *United States v. R. R. Co.* (151 Fed., 545.)

The effect of these decisions, and particularly in view of the re-enactment of the provisions now embodied in subsection 14, is to establish the rule that the first liquidation of the collector is not conclusive upon the United States; that in the absence of limitation a reliquidation may be had at any time; and that the only limitation is contained in section 21 of the act of June 22, 1874, which by implication also recognizes the right to reliquidate after the first liquidation is had.

The cases in which the question had arisen were cases in which the liquidation occurred within the one year's period fixed by the statute of 1874. But it is obvious that the power to reliquidate is precisely the same in any one of the three instances mentioned in that section. The limitation is that reliquidation shall not occur after the expiration of one year from the time of entry, in the absence of fraud, and in the absence of protest by the owner, importer, agent, or consignee. So if a reliquidation may be had at any time within one year, by the same authority if fraud exists or if a protest is had, a reliquidation may take place after the year. Or to state it in another way, there is no limitation fixed by section 21 except a limitation which arises *only* in the absence of fraud and in the absence of protest. So far as section 21 contains an implied authority for reliquidation, it is equally as forceful in importing the right to reliquidate in case of fraud and in the case of protest after the lapse of one year as it is in importing the right to so reliquidate within the period of one year.

This brings us then to a consideration of the question whether when a reliquidation is had after one year it is incumbent upon the Government in case of an appeal to establish that there was in fact fraud before a reliquidation can be justified. That the right to recover these duties against imported merchandise vested in the Government upon the importation is too well settled to require extended discussion. Upon this point see the cases cited, *supra*. And that the power of the collector to reliquidate existed prior to the act of June 22, 1874, is determined by cases cited. See particularly *United States v. Calhoun* (184 Fed., 501).

In this case the collector reports that—

Evidence was produced to show that the returns of the United States weighers were false and fraudulent, hence the liquidations were declared void and reliquidations were made on the true weights, as found on the amended returns of the United States weigher.

The briefs of the importers and *amici curiæ* concede that if the collector proceeded within the authority conferred upon him by statute his acts carry with them the presumption of correctness, but they urge that the collector has no authority to find that fraud exists before he can reliquidate, and hence when his reliquidation is challenged by protest, as in this case, that it is incumbent upon the Government at the hearing before the board to go ahead and establish the existence of the fraud. In other words, they treat the case much as if the appeal here were an appeal from the finding of fraud rather than the reliquidation. Upon this theory, however, until fraud were established it is manifest there could be no reliquidation whatever, because if the collector is without power to find fraud he can in no case reliquidate on that ground, unless and until it is otherwise found, for which procedure the statute expressly or impliedly makes no provision. In this view there is really no reliquidation here to be challenged by protest.

The conduct of the importers, however, negatives this theory, because they have paid the reliquidated duties under protest, thereby taking the position that there has been a reliquidation, and are now prosecuting a protest for the purpose of having the same set aside and the moneys refunded.

We think it can not be said that this differs from other cases of an appeal from a liquidation of the collector in this respect. The very authority to liquidate, which resides in the collector alone, implies an authority to ascertain certain facts—for instance, to determine whether the goods were imported, whether entitled to free entry or dutiable, each of which as well as other findings are necessarily implied in the liquidating act and all of which, if protested against, may be challenged upon the hearing of the protest. The entire subject matter of reliquidation is within his jurisdiction, and the power to determine the existence of the facts necessary to warrant the same inheres in him. Whether he will reliquidate or not is a matter in which he must exercise his discretion. It will not be presumed that he will without investigation wantonly and without cause exercise the power, but it will be presumed, when the same has been exercised, that it was warranted, and unless appeal is given from such decision, as it is in this case, such action is conclusive and by the statute is made so unless appealed from.

That this may involve the proving of a negative on the part of the importers does not affect the question, for in *Arthur v. Unkart* (96 U. S., 118), a leading authority upon the proposition that the acts of public officers acting within the scope of their authority are presumed to be correct, it is clearly recognized and cases are cited to the proposition that the support of a negative allegation often devolves upon parties who challenge the correctness of such official action.

It must always be kept in mind that in this case the statute makes no provision for the finding by any tribunal other than the collector of the existence of facts which warrant his action, and that in this case he has not, as is ingeniously argued, simply *claimed* or *asserted* that fraud exists, but, on the other hand, he has, as he must have done, *found* the existence of fraud. The position taken by both importers and *amici curiæ* here, if adopted, really results in a judicial annihilation of the settled doctrine of the law that the acts of officers of the law upon a subject of which they have jurisdiction are presumed to be correct.

This case is not the institution of a suit by the importers in a court of common-law jurisdiction, but is a special proceeding authorized by statute for the purpose of challenging the correctness of a decision of the collector, which decision is declared final unless appealed from. The importers have no constitutional right to review this decision in the courts. The right to do so is a favor granted to them by the United States.

As was said in the case of *Arnson v. Murphy* (115 U. S., 579, 584):

The right of action does not exist independently of the statute, but is conferred by it. * * * But the statute sets out with declaring that the decision of the collector shall be final and conclusive against all persons interested unless certain things are done. The mere exaction of the duties is, necessarily, the decision of the collector, and on this being shown in any suit it stands as conclusive till the plaintiff shows the proper steps to avoid it.

But, if it be assumed that the ordinary rules of pleading observed in civil causes may be invoked here, it should be noted that the statute, section 21, *supra*, excepts from the operation of its limiting provisions the following cases: First, where the year has not elapsed from the payment of the original liquidated duties and the delivery of the merchandise; second, where there is fraud; and, third, where protest has been made. In other words, in the presence of any one of these conditions the bar of the statute does not apply, and their nonexistence is necessary to permit the liquidation to be final and conclusive upon all parties.

To obtain the benefit of the provision for finality of the first liquidation, in such a statute, it seems that any person who seeks to impeach a reliquidation must aver and prove the nonexistence of the statutory exceptions. This rule is fully set forth and discussed in Lewis's *Sutherland Statutory Construction* (vol. 2, sec. 351). See also *Arnson v. Murphy*, *supra*.

The importers here evidently recognized its applicability, because their protest expressly denies the existence of fraud.

The question may be somewhat novel, as it is unusual to require one to prove the absence of fraud which may be imputed to him. The existence of fraud, however, is only incidental to the question

as to the correctness of the reliquidation, and upon that issue the importers meet and must overcome the presumption that it is correct. Tested by the rule of pleading above mentioned the importers have failed to bring themselves within the same by failing to prove their averment that there was no fraud.

There is also another view of the case not discussed by counsel which ought not to be disregarded or overlooked. The original and amended weigher's returns are a part of the files, were before the board, and are before this court. These amended returns and the reliquidation thereon relate only to garlic and chestnuts, while some of the entries, 14 in number, cover in addition other merchandise. Upon these corrected weigher's returns are written statements to the effect that the greater part of the reliquidated merchandise had been traced from the importers to various persons who had weighed the same and kept a record of such weights, with which the weights shown in the corrected returns substantially correspond; that in some instances the merchandise had been paid for upon the basis of such weights; and that in at least one case the importers had billed the goods at 46,253 pounds, which was some 3,500 pounds greater than the weight thereof as originally returned by the weigher. We have examined some of the files relating to all these 14 entries, and therefrom it appears that the corrected returns increase the weights above those originally returned in amounts varying from 1,000 to 16,000 pounds in each of such entries.

We doubt if it can be said that these facts are not evidence of fraud, which, unexplained, would seem to import a deliberate and, for a time at least, successful attempt to pass many thousand pounds of merchandise through the customs without paying duty thereon. While it has been, as we understand, uniformly held that the weigher's return is conclusive upon the collector and the Board of General Appraisers where he has acted within the rules of law prescribing his duties, yet if he has fraudulently underweighed merchandise he has not so acted, but has violated not only the law but his statutory oath of office, and his weighing becomes a nullity. For an authority reviewing decisions on this subject see G. A. 6620 (T. D. 28249). It is also there held that where the weight is void or illegal in a particular case the actual weight for dutiable purposes may be determined by evidence *aliunde*.

In the case at bar the first weights have by the proper customs officers been found fraudulent and void, and amended certificates of weight with indorsements showing how the same were ascertained have been filed in the case and submitted to the collector. The collector has satisfied himself, as he says, upon *evidence produced* that the first weights were fraudulent and has reliquidated upon the basis of the weigher's amended returns. These returns and

amended certificates are a part of the case and would seem to be sufficient, if it were necessary to show fraud in the first instance, to support the judgment of reliquidation. Thereby importers were put upon notice as to the particular fraud found. They can not claim ignorance, uncertainty, or embarrassment as to what the issue was, and they, better than anyone else, should have knowledge of the facts necessary to meet the same. They were not entitled to a hearing before the collector upon this question, but could get their day in court by appealing from the reliquidation to the board, as they have done.

We are of opinion, for the reasons hereinbefore set forth, that it was not incumbent upon the Government in the first instance to introduce evidence tending to support the correctness of the reliquidation of the collector, but that in this as in other cases of reliquidation where the collector has acted within his authority it is the duty of the importer to go ahead and by proof overcome the presumed correctness of the collector's action. Until this is done it is *prima facie* correct and must be affirmed.

The judgment of the Board of General Appraisers is *reversed*.

HOLLENDER & Co. *et al.* v. UNITED STATES (No. 1118).¹

GAUGING BEER IN HALF BARRELS.

In the absence of satisfactory proof showing that the collector assessed duty on a greater quantity of beer than was actually imported, the importers are not to be arbitrarily relieved from the payment of the duties required by law.—Hollender & Co. *et al.* v. United States (4 Ct. Cust. Appls., 406; T. D. 33850).

United States Court of Customs Appeals, February 10, 1914.

APPEAL from Board of United States General Appraisers, G. A. 7452 (T. D. 33303).
[Application for rehearing denied.]

Walden & Webster for petitioners.

William L. Wemple, Assistant Attorney General, for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

PER CURIAM: The quantity of beer imported in this case was necessarily determined by the collector of customs when he assessed it for duty and his decision in that behalf must be presumed to be correct. The collector's decision as to all except deficient barrels was sustained by the branded capacity of the packages, and his finding as to the deficient barrels was sustained by the tapping tests of the official gaugers, with some insignificant exceptions concerning which it was expressly stated by the appellants in their brief that no point or claim was made. We held that the branded capacity of nondeficient barrels could not be impeached by the bottling test upon which the

¹ Reported in T. D. 34195 (26 Treas. Dec., 289).

importers relied, and that the collector's decision as to deficient packages must stand, for the reason that apparently no test of them was made at all and no evidence offered showing the true wantage or that the collector's estimate of wantage was incorrect. So far as we are informed by the record, the collector made proper allowances for all outage, and in the absence of satisfactory proof showing that he assessed duty on a greater quantity of beer than was actually imported we would not be justified in granting a shortage allowance as a concession to the importers, thereby arbitrarily relieving them of duties which the law provides shall be collected.

Petition for a rehearing *denied*.

SAKAI *et al.* v. UNITED STATES (No. 1264).¹

UMEBOSHI.

The evidence does not warrant the conclusion that the merchandise is fruit packed in its own juice. It does justify the contention of the importers that the umebooshi imported should be classified as fruits in brine. They were entitled to free entry under the tariff act of 1909.

United States Court of Customs Appeals, February 10, 1914.

APPEAL from Board of United States General Appraisers, Abstract 33522 (T. D. 33732).

[Reversed.]

William Hayward for appellants.

William L. Wemple, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, of counsel; *Samuel Isenschmid*, special attorney, on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

SMITH, Judge, delivered the opinion of the court:

Japanese fruits resembling plums, imported in kits, were classified by the collector of customs at the port of San Francisco as "fruits * * * preserved or packed in * * * their own juices." The goods were accordingly assessed for duty at 1 cent per pound and 35 per cent ad valorem under that part of paragraph 274 of the tariff act of 1909 which reads as follows:

274. * * * Comfits, sweetmeats, and fruits of all kinds preserved or packed in sugar, or having sugar added thereto, or preserved or packed in molasses, spirits, or *their own juices*, if containing no alcohol, or containing not over ten per centum of alcohol, one cent per pound and thirty-five per centum ad valorem; * * *.

The importers protested that the goods were fruits in brine and therefore entitled to free entry under the provisions of paragraph 571, which paragraph reads as follows:

FREE LIST.

571. Fruits or berries, green, ripe or dried, and *fruits in brine*, not specially provided for in this section.

¹ Reported in T. D. 34196 (26 Treas. Dec., 290).

The Board of General Appraisers overruled the protest and the importers appealed.

The merchandise in controversy bears the name of "umeboshi" or "umezuke," and is imported from Japan. The fruit from which the umeboshi or umezuke here involved is made, is called "ume," and in color, size, and the seed which it contains, closely resembles a very small olive. The ume is picked before it is ripe and, without seeding or peeling, the fruit is packed whole in tubs or barrels with salt in the proportion of about three-fourths of a gallon of salt to a gallon of fruit. Some water is put in to dissolve the salt, but how much none of the witnesses was able to state definitely. After the fruit has been in the salt and water under pressure for 10 or 20 days, it is removed from the tubs or barrels and dried in the sun for some days. Why the ume is put under pressure does not appear, but as the fruit is not crushed or its form changed, it is reasonable to infer that the pressure imposed is not beyond that required to keep the fruit immersed in the salt and water. When dried the fruit is ready for domestic consumption, and need not be further processed. If, however, the umeboshi is intended for shipment or export, it is repacked in the original salty solution, to which additional water and salt is sometimes added.

There appears to be at least two kinds of umeboshi or umezuke, one of which is uncolored and the other colored red by packing with the fruit a leaf called shiso or sage. The umeboshi which is colored is of a larger size than that which is uncolored. With the exception that one is artificially colored and the other not, both classes of umeboshi appear to be subjected to the same packing processes.

The finding of the board that the fruit is packed in its own juices seems to have been based on the following testimony offered by the importers in support of their protest:

Witness Kagawa.

By Mr. BLY: Q. Is there any liquid in the tubs besides the ume?—A. When we open the kit, you know it comes some liquid; when we prepare, we just use salt.

Q. How much salt is put in the water?—A. Well, just—

Mr. BALDWIN. He didn't say there was any water at all.

Q. How is it put in the tubs or kits?—A. How to put in?

Q. Yes; how is the ume put in the kits?—A. With the salt, so as just to keep it preserved.

Q. Is there any water in there?—A. Sometimes they use some water, but I don't know what the exact quantity is—according to the size of the ume they use differently. * * *

By Mr. BALDWIN: Q. When you have imported these kegs of fruit into this country, and you have opened the keg, have you found any juice or liquid?—A. We generally see some liquid in it.

Q. About how deep is the liquid generally?—A. Sometimes they come in full; sometimes they don't, because they may leak during transportation.

Q. If there is no leakage, then the juice stands level with the top?—A. Not to the top; nearly to the top. * * *

By Mr. BLY: Q. When you state that the *juice* is in the kit, what do you mean by *juice*?—A. Juice? The juice is the liquid, you know. I think it comes out from the salt.

Q. Lots of it?—A. *Salt and water.*

Witness Ohashi.

By Mr. BLY: Q. Will you state how it is produced (umeboshi)?—A. * * * After they get salted they take the ume out from the *salty juice* and dry it in the sunshine for five days to take all the wet out, make it dry, and then they pack in little kegs—some 5-gallon, some 10-gallon, and so on—and they ship all over the country, and they use it for purposes of exportation to America. If they haven't got any *juice*, I mean *salt water*, they may dry too much; that is why they put the water in—they put the water back again, you see. In umezuke or ume they are once dry, and when they ship it out they put the salt water in again. * * *

By Mr. BALDWIN: Q. Do you understand that this sample was placed in a barrel with some salt, was left there a while, then taken out and dried, and was then put back into similar containers with salt water?—A. Yes.

Q. With additional salt, or just with some water?—A. No. I mean the *juice* as it is after that. The salt is melted, leaving water, and they put that back again.

Q. The same *juice*?—A. *The same juice.*

Q. They don't put any water in?—A. They do sometimes; sure.

Q. What is it that forms this liquid with the salt? Is it just the *juice* that comes from the fruit itself?—A. No, no. To 1 gallon of fruit they give 1 gallon of salt.

Q. And when they put them in together that way the salt becomes liquid?—A. Yes, sir.

Q. What is it that makes it liquid? Is it the juice from the fruit that makes the salt in the form of liquid?—A. No; I don't say *juice from the fruit*.

Q. But the fruit has *juice*?—A. Yes, sir.

Q. Doesn't that get into the salt?—A. I don't think so.

Q. Are you sure?—A. I don't think so.

Q. Are you sure?—A. I am not sure. Anyway, they mix the salt and the juice together; it is mixed and made wet you see.

Q. The *juice* is the liquid that comes from the fruit, isn't it?—A. Juice?

Q. Yes.—A. Mostly from salt.

Q. Isn't there some juice that comes from the fruit itself?—A. Some of it, of course.

By Mr. BLY: Q. This liquid that is put in the second kit before you ship; where do you get that liquid?—A. The liquid?

Q. The liquid.—A. *That is the salt and the water.*

Q. How do you get your liquid—the first liquid? You say it is *salt and water*. How do you get that together? You call that the *juice*?—A. Yes, sir; the *juice*.

By General Appraiser HOWELL: Q. Let me see if I understand you. You first put the fruit in the barrel with the salt?—A. Yes, sir.

Q. Anything else?—A. Yes, sir; a little water to melt the salt.

Q. You do put water in?—A. Yes, sir; a little to melt the salt.

Witness Miwa.

By Mr. BALDWIN: Q. Do they ever put any salt in without water?—A. Yes, sir; sometimes.

Q. Sometimes?—A. Yes, sir.

Q. When they do that, does the *juice* that comes out from the fruit itself make the salt into liquid?—A. The *salty water* is to keep the umeboshi, to maintain the shape of the umeboshi itself; to protect the *juice* in coming out; to keep the *juice* from getting out.

Q. Do you think that the juice comes out and makes liquid of the salt?—A. You mean the juice from the umeboshi?

Q. Yes.—A. I don't think so.

Q. Are you sure about that?—A. I am quite sure about that.

We think that this evidence does not warrant the conclusion that the merchandise is fruit packed in its own juices, and that it does justify the contention of the importers that the umeboshi imported should be classified as fruits in brine. The witnesses were Japanese with no great command of the English language, and it seems to us that some of the questions put to them were unwittingly propounded in a form which gave them the impression that liquid and juice were synonymous terms. But however that may be, the witnesses, when submitted to a careful examination as to what they really meant by juice, made it reasonably clear that they used the term as the equivalent of liquid and as a designation for the salt and water solution in which the umeboshi was packed for shipment.

Pressure or any other practical process for the extraction of the fruit juices would have either crushed the fruit or broken the skin or at all events altered, if it did not completely destroy, its form. That the ume was subjected to no such treatment and that no appreciable quantity of its juices was extracted is evidenced by the uncrushed, unbroken samples of the merchandise submitted to the board at the hearing, and by the fact that the sample of the fruit still retains the form which it had when plucked from the tree. It is entirely possible that some of the fruity juices not held fast by the cellular tissue or the meat of the fruit may have escaped by osmosis, but that any considerable quantity escaped in that manner is fully rebutted by the fact that the liquor in which the fruit is packed has the flavor of salt and water and not that of fruit juices. The suggestion that the fruits were simply packed in salt and that their own juices dissolved the salt and made the liquor in which they were preserved we must decline to accept, because at best very little of the fruit juices could have come in contact with the salt and because if every drop of juice had been squeezed out of the ume it would have been wholly insufficient to dissolve the salt used to pack the fruit, considering that it takes, according to common knowledge, nearly $2\frac{1}{2}$ parts of water to dissolve 1 part of salt.

In addition to all this, it does not seem that there could have been any sound reason for using the juices of the fruit to dissolve the salt in order to produce a liquor which was wholly unfit for human consumption and apparently of no commercial value whatever as a fruit juice. All the witnesses for the importers agree, and their testimony is undisputed, that the fruits after their first treatment with salt and water are ready for domestic consumption, but that if they are intended for exportation they must be put back into the solution of salt and water in order to preserve them, and certainly to achieve that object a solution of salt and water would be far more effective than would a solution of salt and fruit juice, which by reason of the

juice would contain in itself elements tending to promote decomposition and not preservation of the commodity.

There may be kinds of umeboshi or umezuke packed in their own juices, but we are convinced that the importation represented by the sample submitted to us is not a fruit packed in its own juice, but a fruit in brine and therefore entitled to free entry.

The decision of the Board of General Appraisers is *reversed*.

HAMPTON, JR., & Co. v. UNITED STATES (No. 1186).¹

AN ALLEGED REPLACE INVOICE.

The facts as stated in the opinion of the court were correct. Hampton, jr., & Co. v. United States (5 Ct. Cust. Appl., —; T. D. 34093). This alleged replace invoice was not the true replace invoice, for the affidavit accompanying it was made nearly four months after the decision of the Secretary of the Treasury was rendered.

United States Court of Customs Appeals, February 27, 1914.

APPEAL from Board of United States General Appraisers, Abstract 31984 (T. D. 33338).

[Petition for rehearing denied.]

Walter Evans Hampton for the petition.

William L. Wemple, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, of counsel), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

PER CURIAM: The invoice printed in the record and referred to in the petition for a rehearing as the *replace* invoice is not the true replace invoice as shown by the original official papers forwarded to the court, but a third invoice attached to an affidavit dated April 16, 1912. This third invoice could not have been presented to the Secretary of the Treasury prior to his refusal to correct the entry, inasmuch as the affidavit accompanying the invoice appears to have been made nearly four months after the decision of the Secretary of the Treasury was rendered. The protest of the importers is dated April 8, 1912, and consequently the third invoice and affidavit attached thereto was not presented to the collector prior to liquidation. The replace invoice, as stated in the opinion of the court, did not enumerate as deductible charges 13 shillings for bags and 37 pounds 12 shillings and 10 pence for seller's profit. The facts as stated in the opinion of the court were correct.

The petition for rehearing is *denied*.

¹ Reported in T. D. 34248 (26 Treas. Dec., 406).

WELTE & SONS v. UNITED STATES (No. 1273).¹

MUSIC ROLLS FOR SELF-PLAYING INSTRUMENTS.

These music rolls are made for a player piano known as the Welte Mignon. This instrument can be used as an ordinary piano and it is equipped for the mechanical production of music. These rolls are essential to the use of the instrument as a player piano and are therefore parts of the instrument.

United States Court of Customs Appeals, February 27, 1914.

APPEAL from Board of United States General Appraisers, Abstract 33565 (T. D. 33738).

[Affirmed.]

Brown & Gerry for appellants.

William L. Wemple, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, of counsel; *Leland N. Wood*, special attorney, on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

SMITH, Judge, delivered the opinion of the court:

Wooden rolls wound with perforated paper especially prepared and designed for the mechanical production of music were classified by the collector of customs at the port of New York as parts of musical instruments and were therefore assessed for duty at 45 per cent ad valorem under that part of paragraph 467 of the tariff act of 1909 which reads as follows:

467. Musical instruments or parts thereof, pianoforte actions and parts thereof,
* * * forty-five per centum ad valorem.

The importers protested that the rolls wound with perforated paper were either music in sheets dutiable at 25 per cent ad valorem under paragraph 416 or manufactures of wood or of paper dutiable at 35 per cent ad valorem either under paragraph 215 or paragraph 420 of said act.

Paragraphs 215, 416, and 420, in so far as pertinent, are as follows:

215. * * * Manufactures of wood or barks, or of which wood or bark is the component material of chief value, not specially provided for in this section, thirty-five per centum ad valorem.

416. Books of all kinds, * * * music in books, or sheets, * * * wholly or in chief value of paper, and not specially provided for in this section, twenty-five per centum ad valorem. * * *

420. Manufactures of paper, or of which paper is the component material of chief value, not specially provided for in this section, thirty-five per centum ad valorem.

The Board of General Appraisers overruled the protest and the importers appealed.

The goods are made for a certain style of "player piano" known as the Welte Mignon. The Welte Mignon is equipped and may be used as is the ordinary piano, but differs from the latter in that it is

¹ Reported in T. D. 34249 (26 Treas. Dec., 407).

furnished with a device designed for the mechanical production of music. This device or piece of mechanism is supplied with attachments to receive and hold in place wooden rolls with their corresponding musical records, and the rolls, apparently constructed on the principle of the window-shade roller, are provided with pivots and sockets suitable for such attachments. The attachments, pivots, and sockets have no other purpose than to make the rolls a part of the mechanism and so fit it for immediate use. When the Welte Mignon is used as a player piano the perforated paper record is mechanically unwound from the roll and is passed over a contrivance containing openings of a width corresponding to that of the perforations on the paper. The uncovering of the various openings of the contrivance by the perforations of the record applies the pneumatic force which strikes the proper notes and thus produces the musical selection for which the perforated record was made. On the hearing before the board the importers seem to have relied on the claim that the merchandise in controversy was music in sheets. No such claim, however, was made in the briefs or on oral argument of the appeal, and we think we are justified in concluding that that particular ground of protest has been abandoned. By both brief and argument, however, the importers insist that the goods imported are not parts of musical instruments, but mere accessories of the piano and therefore dutiable either as manufactures of wood or manufactures of paper.

In support of this contention it is pointed out that the wooden rolls with their corresponding records are not an essential part of the Welte Mignon piano and that that instrument is not dependent upon such rolls or records for the production of music. That the Welte Mignon may be used as an ordinary piano and that it will continue serviceable as a musical instrument without regard to the rolls may be admitted. It can not be admitted, however, that the rolls are not essential to the use of the instrument as a "player piano." Indeed, without the rolls and records the mechanical device which gives the Welte Mignon the status of a "player piano" would be rendered utterly worthless, and the instrument, deprived of the special feature which makes it valuable for the mechanical production of music, would become no better than an ordinary piano.

The line between that which constitutes a part of a mechanical device and that which is merely supplementary or accessory to it is sometimes quite narrow and difficult to distinguish, but in this case we think it perfectly clear that although the rolls are not necessary parts of the Welte Mignon considered as an ordinary piano, they are essential constituents of the mechanism which makes it a player piano and are therefore parts of the instrument. Moreover, the tariff pro-

vision for parts of musical instruments has, in our opinion, received a judicial interpretation which has met the approval of Congress and which is broad enough to cover goods of the character here involved. Parts of musical instruments were first provided for by paragraph 326½ of the tariff act of 1894, and under that paragraph sheets or rolls of perforated paper designed to be used in mechanical pianos for the production of music were held not to be manufactures of paper, but parts of musical instruments. *In re Hempstead & Co.* (T. D. 16843).

This decision was followed by paragraph 453 of the tariff act of 1897, in which musical instruments or parts thereof were provided for in almost the identical language employed for a like purpose by paragraph 326½ of the act of 1894. Under paragraph 453 certain varnished heavy cardboard strips, perforated with rectangular holes of uniform width and used in orchestrions for the production of music by pneumatic power, were classified as parts of musical instruments and assessed for duty at 45 per cent ad valorem. The importers claimed that the goods were dutiable as music in sheets. The Board of General Appraisers held that this claim could not be sustained, and that the perforated cardboard strips, although detachable, were parts of the musical instrument for which they were designed, inasmuch as they were essential to its use for the mechanical production of music. *In re Pollmann* (T. D. 24803).

The language by which provision was made for musical instruments or parts thereof in the acts of 1894 and 1897 was preserved in paragraph 467 of the tariff act of 1909, and from that we must conclude that Congress saw no reason for changing a classification to which the board had adhered for a period of nearly 15 years, and that therefore it approved the ruling that records for the mechanical production of music constituted parts of the musical instruments for which they were made.

This court held that the records of gramophones, graphophones, and phonographs were parts of such machines within the meaning of paragraph 468. *American Express Co. et al. v. United States* (4 Ct. Cust. Appls., 279; T. D. 33490). As the relation of the metal or composition record to the gramophone, graphophone, phonograph, or other device for the reproduction of vocal and instrumental sounds does not materially differ from that of the perforated paper record to the player piano, we think that the principles enunciated in that case are applicable to the present controversy and decisive of the issues here involved.

The decision of the Board of General Appraisers is *affirmed*.

AUSTIN, NICHOLS & Co. *et al.* v. UNITED STATES (No. 1274).¹

TARE, WHAT NOT—WATER IN TINS.

The merchandise is beans, pease, and mushrooms in tins. The collector included the weight of the water in the tins to determine the weight of the goods. The water was designedly placed in the tins as a preservative of the contents, and is common to the condition of importations of this kind. By paragraph 251, tariff act of 1909, this method of packing was recognized, and the weight of the tins, with their contents, constitutes dutiable weight, and no allowance for tare can be made.—*Shallus v. United States* (1 Ct. Cust. Appls., 316; T. D. 31408).

United States Court of Customs Appeals, February 27, 1914.

APPEAL from Board of United States General Appraisers, Abstract 33519 (T. D. 33732).

[Affirmed.]

Brown & Gerry for appellants.

William L. Wemple, Assistant Attorney General (*Thomas J. Doherty*, special attorney, on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

BARBER, Judge, delivered the opinion of the court:

This case involves two appeals, one by Austin, Nichols & Co. and the other by the Neuman & Schwierts Co. (Inc.).

The merchandise is beans, pease, and mushrooms in tins. The contents were found by the Board of General Appraisers to vary in weight from about one-half kilogram to about 2 kilograms, according to the size of the tins, and the correctness of this finding is not disputed. The tins appear to be of the sizes in which such merchandise is commonly handled and sold to consumers and in that form has been the subject of merchandising for more than eight years. Generally speaking, the record shows that the tins containing pease and beans contain about one-fourth to two-thirds as much water in weight as pease or beans, while those containing mushrooms have about the same weight of water as mushrooms. The evidence also shows that the tins in all cases are completely filled. It appears without contradiction that water is put in at the time the vegetables are placed in the tins for the purpose of helping to preserve the contents. The contents are then sterilized and the cans hermetically sealed. In some, if not all, instances the mushrooms are at least partially cooked before being placed in the tins. It appears in the Austin, Nichols & Co. case that, when the beans and pease are consumed, the water in the tins is used with the contents; in the Neuman & Schwierts Co. case the contrary appears; and in both cases the evidence shows that the water in the tins containing the mushrooms is not consumed.

The collector included the weight of the water in determining the weight of the merchandise—*i. e.*, the weight of the tins and their

¹ Reported in T. D. 34250 (26 Treas. Dec., 410).

contents, beans, pease, or mushrooms as the case might be—and the water was used as the basis of assessing duty according to weight at 2½ cents per pound under paragraph 251 of the tariff act of 1909.

The importers protested, claiming that the weight upon which duty was assessed was too great and that the weight of the water should be deducted as tare from the weight of the contents of each tin and duty taken on only the net weight of the beans, pease, or mushrooms therein; and, if the weight of the water was properly included in the dutiable weight, that such water was the immediate covering of the merchandise and the weight of the tins should not be included in the dutiable weight.

The cases were heard and decided together by the board and the protests overruled. The Government called no witnesses. In substance the board found that the water in the tins containing the beans and pease was edible and formed a part of the dutiable contents of the can; that as to the mushrooms it was not so; that all these tins were small and bought and sold as an entirety; that in view of the provisions of paragraph 251, if it were held that the water in the tins containing the mushrooms was not included in the dutiable weight, it would result in holding that two classes of mushrooms, one in tins, etc., and the other sliced or dried, would pay duty at the same rate, which it thought was not the intent of the paragraph.

Paragraph 251 reads as follows:

251. Beans, pease, mushrooms, and truffles, prepared or preserved, or contained in tins, jars, bottles, or similar packages, two and one-half cents per pound, including the weight of immediate coverings; mushrooms, cut, sliced, or dried, in undivided packages containing not less than five pounds, two and one-half cents per pound.

We are of the opinion in view of the language of this statute that the words "immediate coverings" therein used do not relate to any liquid in which the merchandise may be immersed for the purpose of preserving the same, as appears in this case. The ordinary meaning of the word "covering," which it is unnecessary to discuss, would seem to negative this claimed meaning and the paragraph itself evidently relates the words "immediate coverings" to the immediate containers, such as tins, jars, bottles, and other similar packages thereinbefore mentioned, the weight of which, it is declared, shall be included in the dutiable weight.

The case therefore resolves itself to the question of whether the weight of the water should be included in determining the dutiable weight of the importations.

Several cases are cited by the importers as tending to support their claim that this should not be done. We have examined them all, but in view of the different phrasology of the paragraphs involved and the nature of the merchandise think they are not controlling and do not need discussion.

Paragraph 251 relates to certain merchandise "prepared or preserved, or contained in tins," and it will be noted that the evidence, though somewhat meager, shows that the water is used in preparing these vegetables and preserves them. Of course, it is true to a greater or less extent that the water has permeated all these vegetables and has in turn become more or less impregnated with their juices.

In *Shallus v. United States* (1 Ct. Cust. Appls., 316; T. D. 31408) this court, by De Vries, Judge, somewhat exhaustively discussed the question of tare, and it was said that—

Tare should be allowed only in such cases where its presence was uncommon to the condition of the merchandise as ordinarily dealt in in trade and commerce. * * * The ordinary impurities of merchandise do not constitute tare, but the extraordinary impurities, such as are uncommonly present in the merchandise as bought and sold in trade and commerce, are alone the subject of allowance for dutiable purposes.

This principle was affirmed in *United States v. Baker* (2 Ct. Cust. Appls., 338; T. D. 32076).

In *Vitelli v. United States* (3 Ct. Cust. Appls., 171; T. D. 32460) the authorities were again carefully reviewed by Montgomery, Presiding Judge, and the rule laid down in the first-mentioned case adhered to. This case involved the importation of garlic bulbs and the stalks or tops to which they grew, and it was claimed that the bulbs only were dutiable and that the tops or stalks should be treated as tare. It appeared, however, that the garlic in its imported condition was an article of trade and commerce, that the stalks served to preserve the bulb and was sold as a part of the garlic to consumers. The claim that the stalks or tops should be treated as tare was denied.

In the case at bar the water in which the merchandise is immersed is a foreign substance, and in that sense might be said to be an impurity; but it is, nevertheless, placed there as a preservative and is common to the condition of such merchandise in importations of this character. The presence of the water is not the result of accident or of insufficient cleaning, but of design, and some of it, at least, from necessity in this method of merchandising, because some water must be placed in the tins in order that the contents may be sterilized.

The tins and contents are as entireties the subject of trade and commerce, and as such go to the consumers.

By paragraph 251 we think Congress intended to recognize this method of preparing, preserving, transporting, and merchandising pease, beans, and mushrooms, that the weight of the tins with their contents constitutes the dutiable weight of the importations, and that no allowance for tare of the kind claimed here may be made.

We find no error in the judgment of the Board of General Appraisers, and it is *affirmed*.

ALTMAN & Co. v. UNITED STATES (No. 1275).¹

1. "MATERIALS" AND "GOODS."

"Materials" means that from which an article is made up. "Goods" has a broader signification and includes the material upon which some work has been performed, and applies so long as these retain their character of not being manufactured into an article.

2. PLAIN COTTON UNDERWEAR WITH LACE ADDED.

In the proviso to paragraph 349, tariff act of 1909, "goods" has no broader signification than as stated, and it was not there intended to include a completed article in terms provided for elsewhere. The plain cotton underwear with lace added thereto of the importation does not fall within the named proviso.

3. EMBROIDERED FABRICS.

Paragraph 349 provides not only for embroidered articles, but for fabrics embroidered in any manner by hand or machinery. The paragraph specifies the embroidered fabrics of the importation and as the completed article is in chief value of such fabric and has added the Lever or Gothrough lace, it comes directly within the terms of the proviso and is subject to the highest rate of duty.

United States Court of Customs Appeals, February 27, 1914.

APPEAL from Board of United States General Appraisers, G. A. 7502 (T. D. 33794.)

[Modified.]

Brown & Gerry for appellants.

William L. Wemple, Assistant Attorney General (*Martin T. Baldwin*, special attorney, on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

The merchandise involved in this appeal consists of ladies' cotton undergarments composed in part of lace that has been made on the Lever or Gothrough machines. There are two distinct classes of articles, some of which are plain cotton undergarments with a trimming of lace, and some are made up of embroidered cotton cloth, with the lace added. In none of them is the Lever lace the component material of chief value. Duty was assessed on all the garments at the rate of 70 per cent ad valorem, which is the rate fixed in paragraph 350 for Lever lace. To reach this result resort was had to the first proviso in paragraph 349 of the tariff act of 1909. The Board of General Appraisers sustained the assessment as made and the importer appeals.

We think that the two classes of articles should be dealt with separately, and treating first of the plain cotton underwear to which lace has been added we find that a reference to three provisions of the act is essential. The two paragraphs relied upon by the Government are, so far as essential, paragraph 350, which reads as follows:

350. Laces, embroideries, edgings, insertings, galloons, flouncings, nets, nettings, trimmings, and veils, composed of cotton, silk, artificial silk, or other material (except

¹ Reported in T. D. 34251 (26 Treas. Dec., 413).

wool), made on the Lever or Gothrough machine, seventy per centum ad valorem: *Provided*, That no wearing apparel, handkerchiefs, or articles of any description, composed wholly or in chief value of any of the foregoing, shall pay a less rate of duty than that imposed upon the articles or the materials of which the same are composed.

And the provisions of paragraph 349, here quoted:

349. Laces, * * * and all other lace articles; handkerchiefs, napkins, wearing apparel, and all other articles made wholly or in part of lace or laces, or in imitation of lace; nets, nettings, veils, veilings, * * * embroideries, trimmings, braids, * * *; wearing apparel, handkerchiefs, and other articles or fabrics embroidered in any manner by hand or machinery, whether with a plain or fancy letter, initial, or monogram, or otherwise, or tamboured, appliqué, or scalloped, * * *; all of the foregoing, composed wholly or in chief value of cotton, flax, or other vegetable fiber, * * *, and not elsewhere specially provided for in this section, sixty per centum ad valorem: *Provided*, That no article composed wholly or in chief value of one or more of the materials or goods specified in this paragraph, shall pay a less rate of duty than the highest rate imposed by this section upon any of the materials or goods of which the same is composed: * * *.

In connection with these paragraphs, reference should be had to paragraph 324, which imposes a duty of 50 per cent on—

Articles of wearing apparel of every description composed of cotton or other vegetable fiber, or of which cotton or other vegetable fiber is the component material of chief value, made up or manufactured, wholly or in part, by the * * * manufacturer, and not otherwise provided for.

It will be noticed that this paragraph aptly describes the merchandise in question and would be controlling but for the provisions of paragraph 349. The latter paragraph was evidently intended to fix a higher rate of duty upon such wearing apparel which has added to it or has a special line of work performed upon it, namely, when it is made in part of lace. The cotton wearing apparel is not *as such* provided for or *specified* in this latter paragraph. It had been previously specified and duty on it fixed. The purpose of paragraph 349 was, as stated above, to fix an added duty upon such wearing apparel when it had lace added rather than to specify or make provision for such articles as materials or goods. These articles had already passed beyond the stage of materials or goods from which articles are made, both in fact and in the tariff classification. Hence the fair inference is that when the Congress incorporated the first proviso to paragraph 349, by which it was provided that no *article* composed or in chief value of one or more of the materials or goods specified in the paragraph should pay a less rate of duty than the highest rate imposed by the section upon any of the materials or goods of which the same is composed, it intended thereby to provide that such an addition to the cotton wearing apparel as should make some other material or goods constitute its chief value should subject such improved article to the highest rate to which any such goods so added would be subject. But it is an equally fair inference that in the absence of such addition of material or goods to the article, exceeding

in value the article provided for and specified in paragraph 324, the rate fixed in the body of paragraph 349, based on the addition of lace, prevails. This construction makes the provisions of the first proviso of paragraph 349 and those of the proviso to paragraph 350 consistent and harmonious. It is clear enough that "materials" mean that from which an article is made up. "Goods" has a broader signification and may and should ordinarily be construed to include the material upon which some work has been performed so long as they retain their character as goods not yet manufactured into an article, as, for instance, goods in the piece. But placed as they are in this proviso in apposition to the word "articles," we think the word "goods" should not have a broader signification than this and was not intended to include a completed article which had been in terms provided for in another paragraph of the tariff act. So that as to the importations which consist of plain cotton underwear with lace added thereto we hold they do not fall within the first proviso of paragraph 349.

A different view must be taken as to embroidered articles. For here paragraph 349 provides not only for embroidered articles but for *fabrics* embroidered in any manner by hand or machinery. It can not be said that the articles, although fully made up, which are composed of fabrics embroidered, fall without the proviso quoted, for such articles are still made up of materials or goods *specified* in the paragraph, to wit, embroidered fabrics. So that the proviso must be held to have relation to embroidered underwear. The component material of the article is an embroidered fabric, and as such fabric is specified in the paragraph. It would follow that if the completed article is in chief value of such fabric, and has also added to it the Lever or Gothrough lace, it comes directly within the terms of the proviso as an article composed in chief value of one of the materials or goods specified in the paragraph, and is subjected to a rate of duty which is the highest rate imposed by the section upon any of the materials or goods of which the same is composed.

This was the ruling in *Stein v. United States* (2 Ct. Cust. Appls., 519; T. D. 32250). It is contended by the Government that this case went further and is broad enough in its language to include any article to which lace has been added. But if we turn to the case to ascertain just what was involved, we find it said that there are two classes of cases:

The first class comprises those in which the foundation material is a cotton embroidered linen handkerchief, to which has been added a cotton lace edging and cotton lace insertions made on the Lever or Gothrough machine. * * * In the second class the completed handkerchief is composed of an unembroidered linen fabric which has been amplified and ornamented by the addition thereto of a cotton lace edging made on the Lever or Gothrough machine and a cotton lace insertion made on the

Gratley machine. Here the Gratley insertion is the constituent of chief value, and the value of the unembroidered linen center is admittedly less than that of either of the other components.

It will be noted as to both of the articles there considered that the goods of which they were composed were specified in paragraph 349, namely, one as insertions, the other as embroideries, so that it was quite correct to say in that case, as we say in this case, of embroidered underwear, that the articles as finished were composed in chief value of one or more of the materials specified in paragraph 349. But this can not be said of the plain cotton underwear, as we have pointed out above.

It results that the order of the Board of General Appraisers should be modified and the protest *sustained* as it relates to plain cotton underwear with the lace added, and *overruled* as it relates to embroidered underwear. It is so ordered.

UNITED STATES v. FENTON, JR. (No. 1276).¹

SHORTAGE—EVIDENCE.

There was ample opportunity to establish the fact, if one, of a shortage in the importation here. But there is no evidence showing or tending even to show the condition of the case of goods at the precise time of importation. To protect the revenues, claims of this character should be clearly made out.—United States v. Brown (2 Ct. Cust. Appls., 189; T. D. 31493).

United States Court of Customs Appeals, February 27, 1914.

APPEAL from Board of United States General Appraisers, Abstract 33799 (T. D. 33789).

[Reversed.]

William L. Wemple, Assistant Attorney General (Charles E. McNabb, assistant attorney, of counsel; Frank L. Lawrence, special attorney, on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

DE VRIES, Judge, delivered the opinion of the court:

This appeal is from a decision of the Board of General Appraisers sustaining a protest against the decision of the collector of customs at Cleveland, Ohio, for a shortage. The importation was one of decorated china lanterns and other goods intended for use in a hotel. It appears that the merchandise was duly entered and delivered into the possession of the importing firm. Upon opening the cases by the importers it is alleged there was discovered a shortage of one lantern in case No. 47. It appears from the record that the case was opened "immediately after delivery," as that was necessary in order to take care of the incoming freight. There is no

¹ Reported in T. D. 34252 (26 Treas. Dec., 416).

evidence in the record tracing the particular case from the custody of the collector to the time of its delivery to the importer and thereafter to the opening of the same. From aught that may appear from this record the case may have been opened while in the custody of the collector after the arrival of the shipment or while in the custody of the importer after delivery to him. There is not found any evidence showing or tending to show the condition of the case, whether or not it had been previously opened or any other evidence of the custody or condition of the case after importation which would seem to have been in the possession of or obtainable by the importer and within his ability to establish at the hearing. The hearing of the case before the Board of General Appraisers was seven months after the discovery of the alleged shortage. There was ample time therefore that communication could have been had with the exporting house or with the importing transportation company, and claim made for a shortage such as would be usual in the ordinary course of trade in such cases. The court, in *United States v. Brown* (2 Ct. Cust. Appls., 189, 190, 191; T. D. 31943), a similar case, said:

* * * We are of the opinion that upon the importers rested the burden of proving that the missing merchandise was not imported and never came within the tariff jurisdiction of the United States. The invoice and the entry of the goods raised the presumption that the goods in the quantities therein specified were actually imported, and to overcome that presumption it devolved on the importer to prove, at least *prima facie*, that the missing merchandise had never as a matter of fact arrived at the proper port of entry. *Merwin v. Magone* (70 Fed., 776, 777, 778). The only evidence produced by the importers in that behalf was to the effect that after the arrival of the packages at the places of business of the owners an unofficial examination of some of the cases on the day of delivery and of others a week later disclosed that certain packages were short of their full complement of bottles. As this discovery was made after the packages were discharged from the vessel and after manual possession of such packages had been surrendered by the customs officers, it can not be considered as evidence showing that the missing bottles were removed from the cases prior to the arrival of the latter within the jurisdiction of the port. The importers failed to make any proof that the cases released by the customhouse were preserved intact while in the possession of the drayman who delivered them or that they were so guarded and cared for that none of the bottles were or could have been removed therefrom while in transit or under his control. Neither was any evidence introduced to show that all reasonable precautions were taken to prevent the abstraction of bottles from the packages after their arrival at the storeroom of the importers or that the merchandise was so protected that its surreptitious withdrawal was impracticable. For all that appears from the record some of the missing bottles may have been lost while in transit from the customhouse and others while the packages were in the hands of the owners. To hold that invoiced and entered goods may be relieved from duty merely on proof of the fact that they were not found in the packages by the importers after they had acquired and the customs officers had lost possession thereof, unaccompanied by any evidence showing or tending to show that the missing merchandise was not lost in transit from the customhouse or withdrawn after deposit in the importers' storerooms, would, in our opinion, establish a precedent likely to lead to very serious abuses.

While the Board of General Appraisers found that the evidence of the loss was sufficient in this case it is obvious that the law as applied to the facts in the Brown case, if applied to the facts in this case, would have resulted in a contrary decision of the board. Conceding all the evidence adduced to be true, the law of the case as applied, as well as the evidentiary fact sought to be established, is at variance with the said decision of this court. While it may be regrettable that relief can not be had in such cases, it is nevertheless necessary, in the interests of the collection of the revenues of the Government, that claims of this character should be clearly established—at least all possible avenues of loss should be excluded by testimony where, as in this case, ample opportunity is afforded.

Reversed.

KUYPER & Co. *v.* UNITED STATES (No. 1281)¹

ARTICLES CAST, PRESSED, ROLLED, AND HAMMERED.

These articles are for use as frames of automobiles. Paragraph 121, tariff act of 1909, enumerates as dutiable thereunder articles which have been subjected to the more common processes in steel working, namely, hammering, rolling, or casting. Paragraph 131 provides for "pressed, sheared, or stamped shapes." The goods here are admittedly "pressed." Paragraph 131 applies.

United States Court of Customs Appeals, February 27, 1914.

APPEAL from Board of United States General Appraisers, Abstract 33645 (T. D. 33763).

[Affirmed.]

Brown & Gerry for appellants.

William L. Wemple, Assistant Attorney General (*Thomas J. Doherty*, assistant attorney, on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

DE VRIES, Judge, delivered the opinion of the court:

The Sauer Motor Co. caused to be imported at the port of New York 250 pieces of steel designed and constructed to be used as frames for automobiles. They were about 19 feet long, three-eighths of an inch thick, and of varying widths from 4 inches at the narrowest to 9 inches in the widest place. They are all larger in the middle than at the ends. A typical form is shown by a blue print in the record as consisting of steel of the above dimensions, which has been pressed into the imported shape from a bar of probably regular dimensions to one tapering in regular degrees at one end and having an indentation pressed into the other, such indentation being so great as to throw that portion of the bar out of line with the other parts. As imported the merchandise is so shaped and reinforced by the processes applied, principally that of pressing, as to form the exact shape required in ultimate use for the automobile frame. The

¹ Reported in T. D. 34253 (26 Treas. Dec., 418).

indentation made is pressed into the form so as to allow space for the swing of the rear axle. The process of construction is described by one of the importers' witnesses as follows:

Q. Just describe all the processes by which those were pressed and finished—those that you saw.—A. The ones that I saw, a steel billet is cast and taken to a furnace and heated and this in a hot condition is rolled until it is a little thicker than the required thickness and perfectly flat.

Q. And, of course, it has equal dimensions at one end as at the other and in the middle?—A. Yes.

Q. Then what?—A. Then it is pressed.

Q. Hot?—A. No; it is cooled again and pressed; afterwards reheated and pressed.

Q. Pressed while hot?—A. Yes; but it is not the same heat. It is taken through a hydraulic press and a die is made.

Q. And is that press which changes the dimension and destroys the form and gives it in the indentation as well as the taper ends?—A. Yes.

Q. After that, what is done?—A. Then it is allowed to cool and hammered to straighten it—take out the warpage from cooling.

Q. Anything else?—A. It is sheared off. From pressing there is always some scrap, you know, that hangs on to it; that is all taken off and cleaned off and length sheared.

The holes and rivets indicated by the record were added after importation. Synopsized, the processes applied are that the article is cast, rolled, pressed, and then hammered. The hammering was applied, as is stated by the witness, for the purpose of straightening out the warpage from cooling. Duty was assessed upon the merchandise by the collector at the port of New York under the provisions of paragraph 131 of the tariff act of 1909 and the relevant portion thereof as "pressed, sheared, or stamped shapes, not advanced in value or condition by any process or operation subsequent to the process of stamping." The importers, who are the appellants, make claim that the merchandise is properly dutiable under paragraph 121 of said act as "structural shapes of iron or steel, not assembled, or manufactured, or advanced beyond hammering, rolling, or casting." The two paragraphs in full read as follows:

121. Beams, girders, joists, angles, channels, car-truck channels, T T columns and posts or parts or sections of columns and posts, deck and bulb beams, and building forms, together with all other structural shapes of iron or steel, not assembled, or manufactured, or advanced beyond hammering, rolling, or casting, valued at nine-tenths of one cent per pound or less, three-tenths of one cent per pound; valued above nine-tenths of one cent per pound, four-tenths of one cent per pound.

131. Steel ingots, cogged ingots, blooms, and slabs, by whatever process made; die blocks or blanks; billets and bars and tapered or beveled bars; mill shafting; pressed, sheared, or stamped shapes, not advanced in value or condition by any process or operation subsequent to the process of stamping; hammer molds or swaged steel; gun-barrel molds not in bars; alloys used as substitutes for steel in the manufacture of tools; all descriptions and shapes of dry sand, loam, or iron-molded steel castings; sheets and plates and steel not specially provided for in this section, all of the above valued at three-fourths of one cent per pound or less, seven-fortieths of one cent per pound; valued above three-fourths of one cent and not above one and three-tenths cents per pound, three-tenths of one cent per pound; valued above one and three-tenths cents and not above one and eight-tenths cents per pound, five-tenths of one

cent per pound; valued above one and eight-tenths cents and not above two and two-tenths cents per pound, six-tenths of one cent per pound; valued above two and two-tenths cents and not above three cents per pound, eight-tenths of one cent per pound; valued above three cents per pound and not above four cents per pound, one and one-tenth cents per pound; valued above four cents and not above seven cents per pound, one and two-tenths cents per pound; valued above seven cents and not above ten cents per pound, one and nine-tenths cents per pound; valued above ten cents and not above thirteen cents per pound, two and three-tenths cents per pound; valued above thirteen cents and not above sixteen cents per pound, two and seven-tenths cents per pound; valued above sixteen cents and not above twenty-four cents per pound, four and six-tenths cents per pound; valued above twenty-four cents and not above thirty-two cents per pound, six cents per pound; valued above thirty-two cents and not above forty cents per pound, seven cents per pound; valued above forty cents per pound, twenty per centum ad valorem.

It will be observed from the schedule of rates applied in the respective paragraphs that paragraph 121 was intended to cover a class of merchandise of a cruder form and ordinarily advanced to a less degree of manufactured completeness than paragraph 131. Thus there are but two grades of rates in paragraph 121, the highest of which is made to apply to merchandise valued above nine-tenths of 1 cent per pound, levying a duty of four-tenths of 1 cent per pound; whereas the schedule of rates in paragraph 131 extends in numerous specific provisions from a class of articles valued at three-fourths of 1 cent per pound, upon which is levied a duty of seven-fortieths of 1 cent per pound, to a class of articles valued above 40 cents per pound, upon which is levied a duty of 20 per cent ad valorem.

This importation consists of a grade of steel devoted to a purpose which common knowledge indicates must be of great strength, and as imported was, save for the boring of the holes for the rivets and the riveting, in a completed shape ready for final use. The record discloses that this shape is advanced by a pressing process which is done by expensive machinery, expressly prepared for that purpose, owned by the said importing firm and operated abroad at the place of the manufacture of the imported articles. It is operated by hydraulic pressure and is manifestly of great strength and power, the application of which to the imported article gives it its shape, identifies its future use, and, in fact, constructs the steel into articles suitable for no other use out of a material which, before the application of these processes, undoubtedly could have been applied to many uses.

Paragraph 121 enumerates as dutiable thereunder articles which have been subjected to the more common steel processes of hammering, rolling, or casting. Paragraph 131 alone provides for "pressed, sheared, or stamped shapes." This merchandise is admittedly a pressed shape.

We are therefore of the opinion that it is more specifically provided for in paragraph 131, which conclusion is reinforced by every intentment supported by the context of the applicable provisions of the law.

Affirmed.

GOAT AND SHEEPSKIN IMPORT CO. *et al.* v. UNITED STATES (No. 1241).¹

1. CONSTRUCTION.

Commercial designation is first to be ascertained and if found to exist it controls the application of the language of the statute.

2. *IBID.*

Where two terms of description are differentiated in a statute and in another paragraph one of these terms is employed, its use here must be taken to be confined to the single subject matter expressed, exclusive of the other.

3. *IBID.*

An administrative interpretation, long continued and adopted in legislation, is controlling.

4. LAMBSKINS NOT SHEEPSKINS.

In conformity with these principles of construction lambskins can not be deemed sheepskins, and the merchandise was entitled to free entry whether classified under either paragraph 574 or 676, tariff act of 1909.

United States Court of Customs Appeals, January 14, 1914.

APPEAL from Board of United States General Appraisers, Abstract 32961 (T. D. 33594).

[Reversed.]

Comstock & Washburn for appellants.

William L. Wemple, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, of counsel; *Charles D. Lawrence*, special attorney, on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

DE VRIES, Judge, delivered the opinion of the court:

This appeal brings up for determination the dutiable classification of lambskins under the tariff act of 1909. The importation was of Russian lambskins. Free entry was accorded those upon which there was no wool. On the wool contained upon the others there was levied by the collector of customs at the port of New York duty at the rate of 3 cents per pound under the provisions of paragraphs 370 and 371 of said act. The importers, who are the appellants here, claim that the lambskins, inclusive of the wool, are entitled to free entry. Other contentions are made by the appellants, but in our view of the case they are not controlling and the merchandise is entitled to free entry under the provisions of either paragraph 574 or 676 of the act. These several paragraphs read:

370. On wools of the third class and on camel's hair of the third class the value whereof shall be 12 cents or less per pound, the duty shall be 4 cents per pound. On wools of the third class, and on camel's hair of the third class, the value whereof shall exceed 12 cents per pound, the duty shall be 7 cents per pound.

371. The duty on wools on the skin shall be 1 cent less per pound than is imposed in this schedule on other wools of the same class and condition, the quantity and value to be ascertained under such rules as the Secretary of the Treasury may prescribe.

574. Fur skins of all kinds not dressed in any manner and not specially provided for in this section.

676. Skins of all kinds, raw (except sheepskins with the wool on), and hides not specially provided for in this section.

¹ Reported in T. D. 34254 (26 Treas. Dec., 421).

The Board of General Appraisers in overruling these protests succinctly stated the position taken by quoting from a previous decision of the board the following concise statement:

It is wholly immaterial whether the skins are of sheep or lambs; the growth thereon is wool, and subject to duty as such.

It is a fundamental principle of statutory construction, which we think this statement overlooks, that in the determination of the force and effect of every statute the whole act must be read together and each part, if possible, be given some efficiency. If the dutiable provisions, paragraphs 370 and 371, quoted *supra*, stood alone, unaffected by any other provisions of the tariff law, we might be justified in saying that the importation is in part at least of wool, that wool is made dutiable under these provisions, and, therefore, this merchandise should be accordingly rated for dutiable purposes. But these dutiable provisions do not stand alone, and whatever force and effect is accorded them by construction must be subject to and in harmony with the associated provisions *in pari materia* of the same act.

The case as presented is one which is fraught with serious doubt. It is not one in which the legislative words and purpose are free from serious question. Accordingly, in the ascertainment of the legislative meaning, we are controlled by the intent indicated by the well-known rules of statutory interpretation and construction. In this inquiry in this case there is afforded the exceptional situation that all the applicable rules of statutory construction lead to the same conclusion.

First and foremost of the rules of construction applicable to a customs revenue measure is the primary one that the words of the legislative body must be considered to have been used in conformity with the customs and usages of the particular trade. Commercial designation is first to be ascertained, and, if found to exist, held to control the application of the language of the legislature. *Cadwalader v. Zeh* (151 U. S., 171-176), *United States v. Vandegrift & Co.* (3 Ct. Cust. Appls., 161; T. D. 32457), *Guthman, Solomons & Co. v. United States* (3 Ct. Cust. Appls., 286; T. D. 32574).

This record presents no conflict upon this question of fact. Three witnesses testified, two on behalf of the importer and one on behalf of the Government. Those who testified on behalf of the importer were long experienced wholesale dealers in sheepskins and lambskins. The Government witness who testified was the examiner of this class of merchandise at the port of New York, of admitted qualifications and long experience. They all agreed that in the trade and commerce of the country there was a well defined, long established, and generally accepted distinction between lambskins and sheepskins. They likewise agreed that this distinction was

clearly and easily distinguishable, resting itself in the differences of appearance, weight, and texture, size and use of the respective articles. The significance of this distinction is made obvious by the language of paragraph 676 of the free list. It is conceded by all parties, as is made apparent by a reading of the various provisions *in pari materia* of the act, that if lambskins are not included within the exception to paragraph 676 of the free list, they fall within the purview of that paragraph, and hence as "skins of all kinds" are entitled to free entry. Preliminary to this inquiry we are confronted with the rule that the exception which carves out of the statute something ordinarily included within its purview must be strictly construed. "An exception is strictly construed." (2 Lewis Sutherland Statutory Cons., sec. 351.) Bearing in mind then that the exception in paragraph 676, which is related to sheepskins alone, must be strictly construed, and being at the same time confronted by undisputed testimony in the record that the trade and commerce of the country did not recognize lambskins as sheepskins, there would seem to be no escape from the conclusion that the Congress did not intend to include them as such, but did include them in the more general language of the purview of that paragraph as "skins of all kinds."

The second rule of construction here applicable is that of legislative differentiation. The question for solution being whether or not in paragraph 676 the Congress intended to include within the word sheepskins, lambskins as well, some light is thrown upon the question by the contrasted use of the respective words, not alone in the act under consideration, but in previous acts *in pari materia*. It is a logical inference and a legal probability, if not conclusion, that if the Congress in its legislation upon this subject has differentiated the words, using both to express its purpose where both were intended to be included, that the use of but one of these words was intended by Congress to be confined to the single subject matter expressed exclusive of the other.

Addressing our attention first to the act under consideration (the tariff act of 1909), we find in paragraph 451 that Congress has levied a duty upon both sheepskins and lambskins; that it did not content itself with the use of the word sheepskins alone, but uses the language "sheep and goat skins (including lamb and kid skins) * * * ." When, therefore, we turn therefrom to paragraph 676 of the same act, which is the provision which excepts out of paragraph 451 that which otherwise would be included therewithin, it being the competing paragraph in the law with the foregoing one, and find that Congress has taken out of the purview of that paragraph by exception sheepskins only, we can see no escape from the conclusion that the word sheepskins in paragraph 676 was used advisedly in contrast with both

sheepskins and lambskins in paragraph 451, and did not include lambskins. If this were an entirely new provision of tariff law with which the legislative body was dealing it might with more force be contended that the congressional expression was accidental and not intentional, though that would not necessarily change or affect the rule of construction. The force of this suggestion, moreover, is entirely neutralized by an advertence to previous tariff acts *in pari materia*. The subject matter, lambskins, as expressly distinguished from sheepskins in the language above quoted from paragraph 451, first made its appearance in paragraph 456 of the tariff act of 1890 in the same form, wherein the Congress legislated as to "sheep and goat skins, including lamb and kid skins, * * * ." The language was repeated in paragraph 341 of the tariff act of 1894 and paragraph 438 of the tariff act of 1897. So that covering a period of almost 20 years, during which four reenactments of this legislative subject were had by Congress, this language and differentiation was repeated and continued. It is not without significance that coincident with the appearance of this phrase in the tariff act of 1890 there also appeared in the free list of that act, paragraph 605, the phrase exempting from duty "skins, except sheepskins with the wool on." Paragraph 505 of the free list of the tariff act of 1894 equally significantly dropped this exceptive language, because all wool was put upon the free list by that act. The tariff act of 1897, however, free list paragraph 664, reenacted the provision in the same language that it appears in this act, and as it appeared in competition with the words of paragraph 438 of that act, "sheep and goat skins (including lamb and kid skins) * * * ." It would seem, therefore, that the Congress, after quite 20 years and during the enactment of four different tariff acts, has not only observed a distinction between sheepskins and lambskins, but has pursued a consistent policy with reference to its exception from such free list provisions of sheepskins alone.

At the oral argument in this court counsel for the Government cited various instances from well-considered cases wherein it was held either directly or by inference that the word "lamb" was included within the word "sheep." Aside from the fact that those are not the words here under consideration, sheepskins and lambskins, which are probably dealt in by different trades and, therefore, treated differently according to the trade understanding, there is the more pronounced reason rendering such cases inapplicable, or at least not controlling, resting in the fact that those words as thus construed appear in statutes having different associate provisions *in pari materia*. The context of the statutes being different the legal effect of one word upon the other must be different. For these reasons it is obvious that while such cases may be instructive they are by no means conclusive.

The third rule of construction here applicable leads to the same conclusion. This rule fortifies the second above considered. It is that where a certain uniform construction has been given a tariff provision by those intrusted by the law with its enforcement, interpretation, and construction, such reading will be adopted by the courts, not alone on account of long-continued usage, but as in this case, where the same words have been repeatedly reenacted by Congress as a legislative interpretation. *Psaki Bros. v. United States* (3 Ct. Cust. Appls., 479; T. D. 33122), *United States v. Post & Co.* (3 Ct. Cust. Appls., 260; T. D. 32568).

In the tariff act of 1883 (par. 706), and many acts antedating the same, as well as in the tariff act of 1890 (par. 588), in the tariff act of 1894 (par. 493), in the tariff act of 1897 (par. 562), and in the tariff act of 1909 (par. 574), there appears a provision for "fur skins of all kinds not dressed in any manner." To those provisions in the tariff acts of 1897 and 1909 were added the words "and not specially provided for in this act" (1909—"section"). The uniform classification, so far as we have been able to discover, of lambskins with the wool on seems to have been to classify them as fur skins under these provisions of the various tariff laws. To the same effect and of equal force was the uniform holdings of the same authorities that where lambskins were tanned or dressed they were classifiable as "furs tanned or dressed" under the same tariff acts and the respective applicable provisions thereof. See G. A. 45 (T. D. 10324), G. A. 1508 (T. D. 12957), G. A. 2907 (T. D. 15726), G. A. 4109 (T. D. 19136), *Mavtner v. United States* (84 Fed., 155), *Fleet v. United States* (148 Fed., 335).

This claim is made in the protest. Inasmuch, however, as the result must be the same, whether the goods are classified under paragraph 574 or 676 of the free list, the determination of that question is here unnecessary.

"Fur skins of all kinds not dressed in any manner" are equally though more generally provided for as "skins of all kinds" and free entry is provided for all such. If they are not skins they are furs, and *vice versa*, and in either case they are *enumerated* articles and hence not nonenumerated within paragraph 480 of the act.

In *United States v. Bennet* (66 Fed., 299), the United States Circuit Court of Appeals for the Second Circuit determined that angora goat skins with the hair or wool on were entitled to free entry under the provisions of paragraph 588 of the tariff act of 1890 as "fur skins of all kinds not dressed in any manner."

Confirmation of these views is found in *Encyclopedia Britannica*, eleventh edition, article "Fur." In enumerating and defining the classes of such the following occurs:

Lambs.—The sorts that primarily interest the fur trade in Europe and America are those from south Russia, Persia, and Afghanistan, which are included under the following wholesale or retail commercial terms: Persian lamb, broadtail, astrachan,

Shiraz, Bokharan, and caracul lamb. With the public the general term astrachan is an old one, embracing all the above curly sorts; the flatter kinds, as broadtail and caracul lamb, have always been named separately. The Persian lambs, size 18 by 9 inches, are the finest and the best of them. When dressed and dyed they should have regular, close, and bright curl, varying from a small to a very large one, and if of equal size, regularity, tightness, and brightness, the value is comparatively a matter of fancy. Those that are dull and loose or very coarse and flat in the curl are of far less market value.

Lastly. With all applicable canons of construction conducing to the conclusion stated, in the presence of an obviously doubtful question of law, this court is bound to construe the statute that the importers, appellants here, shall be accorded the benefit of the doubt. *Woolworth v. United States* (1 Ct. Cust. Appls., 120-122; T. D. 31119), *United States v. Hatters' Fur Exchange* (1 Ct. Cust. Appls., 198-202; T. D. 31237), *United States v. Matagrín* (1 Ct. Cust. Appls., 309-312; T. D. 31406), *United States v. Harper* (2 Ct. Cust. Appls., 101-105; T. D. 31655), *American Express Company v. United States* (3 Ct. Cust. Appls., 475-479; T. D. 33121), *United States v. American Bead Company* (3 Ct. Cust. Appls., 509-515; T. D. 33166), *Newhall et al. v. United States* (4 Ct. Cust. Appls., 134; T. D. 33410).

Reversed.

OVERTON & Co. v. UNITED STATES (No. 1115).¹

1. JUTE AND JUTE BUTTS.

The terms "jute" and "jute butts" are not used without qualification by the trade in the buying and selling of jute; and, consequently, those terms, standing by themselves, can not have been given by the trade a special commercial signification that excluded jute waste or any class of jute fiber available for textile uses.

2. JUTE WASTE STILL JUTE OR JUTE BUTTS.

Goods more than 98 per cent jute are to be regarded as articles composed of jute, and an insignificant percentage of material other than jute found to be present on analysis of bagging did not exclude the goods from the operation of paragraph 355, tariff act of 1909.

United States Court of Customs Appeals, March 25, 1914.

APPEAL from Board of United States General Appraisers, G. A. 7447 (T. D. 33277).

[Affirmed.]

Brown & Gerry for appellants.

William L. Wemple, Assistant Attorney General, for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

SMITH, Judge, delivered the opinion of the court:

Certain merchandise imported at the port of New York was returned by the appraiser as bagging for cotton and was assessed for duty by the collector of customs at six-tenths of 1 cent per square yard under the provisions of paragraph 355 of the tariff act of 1909, which said paragraph reads as follows:

355. Bagging for cotton, gunny cloth, and similar fabrics, suitable for covering cotton, composed of single yarns made of jute, jute butts, or hemp, not bleached, dyed,

¹ Reported in T. D. 34322 (26 Treas. Dec., 541).

colored, stained, painted, or printed, not exceeding 16 threads to the square inch, counting the warp and filling, and weighing not less than 15 ounces per square yard, six-tenths of 1 cent per square yard.

The importers protested that the bagging for cotton was not composed of single yarns made of jute, jute butts, or hemp, but that the goods were either manufactures of other vegetable fiber, dutiable at 45 per cent ad valorem under the provisions of paragraph 358 or manufactures not enumerated or provided for, dutiable at 20 per cent ad valorem under the provisions of paragraph 480. The paragraphs relied upon by the importers read as follows:

358. All woven articles, finished or unfinished, and all manufactures of flax, hemp, ramie, or other vegetable fiber, or of which these substances, or any of them, is the component material of chief value, not specially provided for in this section, 45 per centum ad valorem.

480. That there shall be levied, collected, and paid on the importation of all raw or unmanufactured articles, not enumerated or provided for in this section, a duty of 10 per centum ad valorem, and on all articles manufactured, in whole or in part, not provided for in this section, a duty of 20 per centum ad valorem.

The Board of General Appraisers overruled the protest and the importers appealed. It appears from the report of the appraiser that the importation in controversy consists of five rolls of bagging for covering cotton and that the merchandise is made entirely of jute waste. Jute waste has its origin in a plant called "jute," which is produced extensively in India for its fiber. To secure the best results, according to the standard authorities, the plant is harvested when in flower. If harvested earlier the fiber is weak, and if harvested after the plant has gone to seed the fiber, though heavy and strong, is harsh, woody, and wanting in gloss. The plant, when ready to be processed, is cut off a few inches above the root or pulled up by the roots and, after being tied in bundles, is steeped in water in order to loosen the bark from the stalk and rot the cellular matter binding the fibers together. The bark is then pulled off the stalk from root end to tip and dashed repeatedly against the surface of the water to separate the fibers from the inclosing tissue. The separated filament consists of two classes of fiber, one fine and glossy, which comes from the upper part of the plant, and the other coarse and woody, which is stripped from the lower part of the stalk.

On the hearing before the board, the Government made no appearance and introduced no evidence. On the part of the importers eight witnesses were called, who testified that the fine, glossy filament of the jute plant was known as jute and the coarser woody fiber as jute butts. According to the witness Fleming, the textile material of the fabric in question is all jute waste with the exception of 1.775 per cent, which is nonjute waste. From the testimony relied on by appellants it further developed that there is a kind of jute fiber designated as jute rejections. Jute rejections, as appears from the sample, are uncut lengths of the fiber, and therefore partake of the

qualities both of jute and jute butts, inasmuch as part of the fiber is fine and part of it woody. Jute rejections, however, as disclosed by the samples, are lacking in gloss, have a bad color, and are seemingly not up to the mark in textile strength. From this it is apparent that jute, jute butts, and jute rejections are all jute fiber, the product of the jute plant, and that they are designated by different names, not because they are different fibers, but different classes of the same fiber.

The merchandise under discussion is admittedly composed almost wholly of jute waste thrown off in the process of the manufacture and weaving of jute yarns. Jute waste is in truth and in fact broken, short, and split lengths of jute fiber, which are coarse or fine according to the grade of the fiber from which the waste was thrown off in the process of manufacture, and oily, soiled, or fairly clean, according to the place in the mill or factory from which the waste was gathered or swept up. Jute waste is not a waste in the sense that it is a by-product unfitted for any of the uses for which jute may be employed. On the contrary, as appears from the evidence, with a long fiber to carry it along, and even without such long fiber, jute waste may be spun by special machinery and woven into fabrics just as is the fiber from which it was thrown off. True, the fabric may be inferior in quality to that manufactured out of the longer, better, and stronger filament. Nevertheless, the fact remains that the waste is still fitted to be used as a jute fiber, and that it can be so used is demonstrated by the fact that in this case it was, without the assistance of any long fiber save that of dirty jute yarn waste, converted into bagging for cotton, the very commodity, by the way, which first brought jute into prominence and for the making of which commodity all jute was originally exclusively used by European spinners and weavers. To the common understanding, therefore, jute waste is jute fiber, and a fabric made out of jute waste, whether bagging or anything else, would, in popular parlance, be denominated a manufacture of jute.

The importers, however, contend that the tariff designations "jute" and "jute butts" have a general, uniform, and definite meaning in the trade which excludes jute waste, and that therefore the cotton bagging here in question can not be classified as composed of single yarns made of jute or jute butts within the meaning of paragraph 355. In support of this contention the importers' witnesses testified that all fibers were divided into two general classes, hard and soft, and that jute was ranked with flax and hemp as a soft fiber; that jute fiber was divided into three grades—jute, jute butts, and jute rejections—and that each of these grades was recognized by the trade as a separate and different article; that a delivery of jute would not be regarded as a good delivery of jute butts, and that jute butts would not be regarded as a good delivery of jute, and that jute rejections

would not be accepted on an order for jute or jute butts; that there are different grades of jute, different grades of jute butts, and different grades of jute rejections, and that in ordering jute or jute butts or jute rejections the grade wanted must be designated; that jute rejections is a kind of jute fiber from which the butts have not been cut *and is an inferior quality of jute*; that jute is worth about 5 cents per pound and jute butts about 3 cents a pound; that dealing in waste is a distinct business by itself, although some merchants dealing in fibers handle fiber waste also; that the jute wastes resulting from carding, roving, and weaving the jute are known as card waste, roving waste, and caddis or loom waste; that if any of these wastes is stained with oil it is known as oily waste; that jute waste is jute fiber, but not jute; that in the trade the several kinds of jute waste are separate and distinct articles of commerce, which are bought and sold under different names and vary in price from 30 cents to \$3 per 100 pounds; that the jute wastes used in the manufacture of the merchandise under consideration contained some jute butts and were worth from 30 cents to 75 cents per 100 pounds.

Carefully analyzed, the evidence submitted to the board in support of commercial designation amounts to nothing more than that jute fiber is divided by the trade into two general classes, jute and jute butts, and that each of these classes is in its turn subdivided into as many grades as the convenience of business or the color, fineness, length, appearance, tensile strength, or other characteristics of the fiber may require. True, the witnesses for the importer are all agreed that jute, jute butts, jute rejections, and jute waste are recognized by the trade as different and distinct commodities and that on an order for one class of jute fiber the delivery of another would not be accepted as a good delivery. This testimony, however, loses all its weight when considered in conjunction with other testimony to the effect that jute rejections and jute waste, as well as jute and jute butts, are graded, and that in giving orders for jute fiber the grade wanted must be specified. Naturally if a certain particular kind of jute fiber is ordered the delivery of another grade, kind, or class would not be a good delivery, but from that it can hardly be deduced that a commercial meaning has been given to jute or jute butts which does not embrace jute waste. In other words, inasmuch as jute, jute butts, jute rejections, and jute waste are never ordered by the trade under those names alone, but by designations indicating the grade desired, it follows not only that the delivery of one grade would never satisfy an order for another grade, *but also that the terms "jute" and "jute butts" are not used without qualification by the trade in the buying and selling of jute, and that consequently those terms, standing by themselves, could not have been given by the trade a special commercial signification which excluded jute waste or any class of jute fiber available for textile uses.*

If the jute waste in this case had been of such a character that it was no longer susceptible of any of the textile uses to which jute fibers are devoted or was unmerchantable for any of the purposes for which merchantable jute fiber was peculiarly suitable it might be contended with some degree of reason that this commodity was not jute, but a true waste within the common, ordinary meaning of that term. *Salomon Bros. & Co. v. United States* (2 Ct. Cust. Appls., 431; T. D. 32196); *Patton v. United States* (159 U. S., 500, 501-505); *Latimer v. United States* (223 U. S., 501-504). Such is not the situation here, however, inasmuch as the so-called jute waste was not only available, but actually employed in the manufacture of bagging for cotton, a use to which all jute was originally principally applied. Moreover, if bagging for cotton made of a jute fiber which is denominated jute waste be excluded from the operation of paragraph 355, then apparently such bagging would become dutiable at 45 per cent ad valorem as a woven article or manufacture of "other vegetable fiber," under the provisions of paragraph 358, and that would mean that the bagging in question would be subjected to a duty of more than 3½ cents a square yard or more than five times the duty imposed on bagging made of first-class jute. Such a result would imply a legislative intent to subject manufactures of inferior jute fiber to a much higher rate of duty than manufactures of superior jute—a plain violation of the policy which usually obtains in the preparation and passage of tariff acts, and therefore a result which we can not assume was intended by the Congress, in the absence of anything in the law or the record, to warrant such an assumption.

In our opinion, the jute waste under discussion was, at the time of its conversion into the goods imported, true jute fiber, capable of being spun and woven, and therefore entitled to be regarded as a grade of jute or jute butts. Indeed, if the jute rejections, which partake of the qualities both of jute and jute butts, and are sometimes "not half as good" as jute waste, may be considered as a grade of jute, it is not apparent just why jute waste can not be similarly classified.

The point made that the goods are not made wholly of jute, but in part of seg waste, cotton waste, and hard fiber waste, is not well taken. The amount of seg, cotton, and hard fiber waste in the fabric was less than 2 per cent, and the goods were substantially of jute. Goods more than 98 per cent jute are to be regarded as articles composed of jute, and we must therefore hold that the insignificant percentage of material other than jute found on analysis of the bagging did not exclude that article from the operation of paragraph 355. *United States v. Burne* (4 Ct. Cust. Appls., 298; T. D. 33515); *Swan v. Arthur* (103 U. S., 597-598; *Arthur's Executors v. Butterfield* (125 U. S., 70, 74-75).

The decision of the Board of General Appraisers is *affirmed*.

WADDELL & Co. v. UNITED STATES (No. 1245).¹

TAM O'SHANTER STONES FOR POLISHING.

The merchandise, it is conceded, is like that considered in *Waddell & Co. v. United States* (3 Ct. Cust. Appls., 406; T. D. 32989). The uncertainty in the evidence in the present case as to just how these stones were produced makes strongly against the contention that they are waste, and this evidence does not differentiate this merchandise from that in the former case so as to warrant a different classification.

United States Court of Customs Appeals, March 25, 1914.

APPEAL from Board of United States General Appraisers, Abstract 33348 (T. D. 33695).

[Affirmed.]

Comstock & Washburn for appellants.

William L. Wemple, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, of counsel; *Thomas F. Tumulty*, assistant attorney, on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

BARBER, Judge, delivered the opinion of the court:

The merchandise in this case is invoiced as Tam O'Shanter stones, and the stones are called marble polishers. They were assessed for duty at 35 per centum ad valorem under paragraph 95 of the tariff act of 1909. The importers protested, claiming free entry under paragraph 626, or, if not so held, in the alternative that the stones were dutiable at 10 per cent ad valorem under paragraph 479 as waste not specially provided for, or at the same rate under paragraph 480 as a nonenumerated unmanufactured article. Upon hearing the Board of General Appraisers overruled the protest and, relying upon the authority of *Waddell v. United States* (3 Ct. Cust. Appls., 406; T. D. 32989), sustained the assessment.

In this court the claim for free entry is relied upon, but it is said by the importers that if it is not so held, paragraph 479, rather than paragraph 95, is applicable.

It is stipulated by counsel that the stones are used in their condition as imported for rubbing or smoothing marble or onyx preparatory to polishing it, and for no other purpose.

Exhibits, some 16 in number, represent the stones as imported. The importers' evidence (the Government introduced no testimony) shows that they are mined in Scotland.

A witness who had visited the mines upon one occasion testified that he saw similar stones produced in manner following, quoting his language:

A light charge of powder is used to blast the fine stone to get it out as large as they can get it. The endeavor is to get large stones, say, 14 to 18 inches square and about 2 to 6 inches thick. These small pieces come from breaking in the blasting and the sawing of the stone to get these large pieces. In getting the stones to the size they are sawed as they can make them, approximately 14 to 18 inches square, if they can

¹ Reported in T. D. 34323 (26 Treas. Dec., 545).

get them that large. These pieces (samples) come from both the edge where they are sawed off and from the blasting when the stone is broken up. The endeavor is to get as many as they can of the large pieces.

The testimony of the witness then took the following course:

Q. These are outside pieces or waste pieces?—A. Partly that. I can not say positively whether they came from the outside; they may be from the broken pieces. There is much refuse.

Q. Would the flat surface which you find on these stones indicate they would come from the outside of the large squares cut off?—A. They may and may not. That I am unable to testify to, not having been there when they came out.

Q. I think I understood you to say the merchandise was sawed?—A. The large stones are sawed; yes, sir.

Q. Is there anything else done to get them into the shape of these exhibits here?—A. No, no; not these. On the large stones the top surface is smoothed and the under surface is left as may be.

Q. The smoothing is made by machinery?—A. It is sawed; yes, sir; on the large stones I am speaking of.

Q. What I am interested in this moment is these exhibits. Take this one, for instance. Do you know how a thing like that is produced?—A. That evidently was sawed, but whether it came from a corner or not is more than I can state.

The exhibits are all small stones, varying in weight from 4 ounces to 2½ pounds, and are of irregular shapes. Only one or two stones are of uniform thickness, about 1½ inches, while the others vary from a thin edge to a maximum thickness of about 3 inches, depending upon the part of the stone measured. None are more than 7 inches in length, while the width is less. Some are flat upon two sides; some in the shape of right-angled triangles. One side of every piece has been sawed or artificially smoothed. All of them are of suitable size and shape to be held in the hand.

The testimony of importers, above quoted, leaves it entirely uncertain whether the exhibits are pieces that were sawed from the larger stones in the process of shaping them or are broken pieces resulting from the blasting that have themselves been sawed or artificially smoothed on one side. The witness says he can not tell, and we are equally uncertain. The appearance of the greater number of the exhibits suggests to us, however, the probability that they are the latter rather than the former.

The relevant part of paragraph 95 provides for—

Articles or wares composed wholly or in chief value of earthy or mineral substances.

And paragraph 626 gives free entry to—

Minerals, crude, or not advanced in value or condition by refining or grinding, or by other process of manufacture.

It is conceded that the merchandise is like that considered by the court in *Waddell v. United States*, *supra*, and used for the same purposes. In that case one sample only was shown. That was a small flat stone about two inches thick having the shape of a right-angled triangle, one edge and an obtuse end having been sawed and one side

bearing marks of a stone mason's chisel. The merchandise had been returned and assessed for duty as marble polishers under paragraph 95, above referred to. No parol testimony was offered in the case. The board sustained the assessment, which was upheld in this court. Free entry was claimed there, as here. Martin, Judge, speaking for the court in that case, said:

The next question in the case, and the one chiefly relied upon by the importers, is the claim that the merchandise is free as crude minerals under paragraph 626 of the act. But the difficulty which the court encounters in coming to consider this contention is the fact that there is nothing in the record to explain the history and present condition of the article in controversy. Here is an article composed of stone, possessing an unusual shape such as suggests at once that it was fashioned by design, exactly adapted by form, size, and weight, as well as substance, to a certain well-known industrial purpose, bearing upon its sides the marks of saw and chisel, returned by the appraiser under a given name, to wit, a marble polisher, and apparently requiring no further treatment to fit it for use as such. In the total absence of other evidence in the case the court is unable to find from the facts stated that the appraiser was wrong in his return. It need hardly be observed that the presumption, both of law and fact, favors the correctness of the appraiser's finding and the collector's assessment. * * * But in the present case an inspection of the official sample rather tends to incline the court to the view that the stone in question is the result of a manufacturing process, crude no doubt, but nevertheless actual, designed to produce a completed article suitable for a given use. It does not seem probable that the stones as imported are in the condition in which they came from the quarry, but rather that their shape and size result from labor and design applied to that end. Particularly is this likely in view of the fact that the sample is but one of a considerable number of like stones possessing at least in general the same characteristics and bearing in common the name of marble polishers.

We agree with the board that the evidence and facts do not sufficiently differentiate the merchandise here from that in the Waddell case to authorize a different classification thereof.

In this case, as in that, however, the merchandise may have first appeared in the quarry, it has been processed or selected (whether any was selected the evidence does not make clear) for and is devoted and set apart to an especial use to which only it is applied. It takes the name of Tam O'Shanter stones or marble polishers and as such becomes a distinct article of commerce. It is composed of a mineral substance within the rule stated in *United States v. Tamm* (2 Ct. Cust. Appls., 425; T. D. 32173).

The uncertainty in the evidence as to just how these stones were produced, above pointed out, makes as strongly against the claim that they are dutiable as waste as that they are entitled to free entry, especially when confronted in the first instance by the presumed correctness of the collector's assessment under paragraph 95. To maintain their contention it was incumbent on the importers to establish more clearly just how the merchandise came to assume the particular condition typified by the samples.

The judgment of the Board of General Appraisers is *affirmed*.

MARSHALL FIELD & CO. *v.* UNITED STATES (No. 1257).¹

MARBLES NOT SHOWN TO BE SCULPTURES.

No typical exhibits of the merchandise were produced, and the testimony as offered in behalf of the importers was based on photographs. The burden of showing the goods to be sculptures rested on the importer. The board found the importers had failed to make out their case, and there is nothing in the record to warrant a reversal of that finding.

United States Court of Customs Appeals, March 25, 1914.

APPEAL from Board of United States General Appraisers, Abstract 33287 (T. D. 33677).

[Affirmed.]

Lester C. Childs for appellants.

William L. Wemple, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, of counsel; *Charles D. Lawrence*, special attorney, on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

BARBER, Judge, delivered the opinion of the court:

In this case it is required to determine whether certain importations are dutiable at 50 per cent ad valorem as manufactures of marble under paragraph 112 of the tariff act of 1909, as assessed, or at 15 per cent ad valorem under paragraph 470 of the same act as sculptures, as claimed by the importers.

The merchandise was not exhibited to the board, but certain photographs were introduced in evidence before it.

In the returns to this court the board states that the "photographs referred to in the appraiser's report and collector's Exhibit 1, referred to in the testimony, will be forwarded to the court after briefs are filed."

The opinion of the board indicates that there were 27 protests, 20 of which were abandoned. All the protests were overruled by the board.

At the hearing there the importers first called Mr. Garnsey, its purchasing agent, who testified he bought a part of the merchandise. He was shown photographs covering three protests and testified that the same correctly represented what they purported to show; that he had "seen the exact thing and the photographs." These photographs were received and marked "Coll. Ex. 1." The witness stated that on some of the photographs lead-pencil marks were placed to indicate the article claimed on under the protests.

In the files here are three envelopes, each marked "Coll. Ex. 1." Therein are contained: (1) A photograph of an article, apparently a bowl, in the center of which is the figure of a child with a shell in its hand, the bowl being supported by a standard with a base. (2) Another showing a bowl from the center of which arises a standard supporting a smaller bowl, from the center of which arises another standard supporting something which resembles a vase. (3) An-

¹ Reported in T. D. 34324 (26 Treas. Dec., 548).

other showing a bowl supported by short legs or feet, from the center of which arises a column or pedestal supporting what appears to be an urn. (4) One large and one small photograph, probably of the same article, and which seem to be the "low fountain" referred to in the evidence. (5) Another showing the figure of a lion on a low base.

In another envelope, not marked as an exhibit, is a small photograph showing as the center figure a bowl supported by a standard and base; from the center of this bowl arises another standard supporting a small bowl from whose center another short standard arises. This photograph we assume to be the one referred to in the appraiser's report. It is marked with a number corresponding to that of one of the protests in the case which does not appear to have been abandoned.

Some of these photographs show various other articles and figures, but with one exception there appears on each of those a lead-pencil mark drawn around the central figure.

We assume from the photographs in connection with the record that the appeal here relates only to the articles specifically above described, and that for the purposes of this case all such articles are in the general class of fountains, excepting the figure of the lion; and it is not clear whether the appeal relates to this or not, although we so assume.

The photographs indicate that all these articles were cut or carved.

The opinion of the board and the briefs in the case would indicate that various other articles, as well as those above mentioned, were supposed to be the subject of this appeal, but in view of the fact that the evidence appears to refer only to those shown on the photographs, as above stated, we limit the decision thereto. If we err in this regard, it arises from the failure of counsel to sufficiently direct the attention of witnesses to the articles in issue, and also to see that the record sent up is sufficiently comprehensive and explicit.

The material part of the board's opinion is as follows:

Some testimony was introduced on the part of the importer calling for expressions of opinion by the witnesses as to the character of the artist, judging from the photographs taken of some of the articles. This testimony is entirely uncertain and speculative, in our judgment, upon the question of whether the importations are the "professional production of a sculptor only." We are not satisfied that upon the whole record we would be warranted in overthrowing the finding of the collector.

The substance of the relevant evidence is as follows:

Mr. Gardner, a professional sculptor, testified that he had examined the photographs of this importation; that he would say they showed that the originals had artistic merit and should be classed as sculpture; that they were the production of professional sculptors; that "it took a sculptor to make the design—it had to be molded by a sculptor;" that he did not know whether the articles were finished by a sculptor or by an artisan; that from what he had seen he imagined works of the character were made in large quantities; that he had seen them in this country.

Mr. Peterson, also a professional sculptor, testified that he had examined the photographs; that they were very artistic and he should say from the technique of the work shown represented articles made by professional sculptors; that he did not think they were made in large quantities; that he should say by the technique that the goods were fully executed by a sculptor, and to illustrate this he referred to the figure of a dolphin shown in the low fountain, and said no artisan made it; that by merely looking at the photographs he could detect the sculptor rather than the artisan; that the fineness of the outline and the technique of the work which would be reflected in the photographs enabled him to so conclude.

Mr. Garnsey was again called. He testified that he visited Italy to purchase a part of these articles; that he had had long experience in this line of business; that he knew some of the sculptors of the merchandise; that he knew a sculptor named Lenzi, who was, he said, the sculptor of the low fountain; that he knew Lenzi was a professional sculptor; that all the photographs, in his opinion, represented articles which were the production of professional sculptors (but, except as above-mentioned, he did not name the sculptors); that he had no personal knowledge as to whether the designs shown by the photographs were executed and completed by a professional sculptor rather than by a skilled artisan in his employ; that he could not say whether any one of the articles shown was the only one of its kind or was a duplicate; that of the low fountain and at least one other article the importer had duplicates; that for all he knew the importations may have been designed and executed by skilled artisans working under the superintendence of a sculptor. Near the close of his testimony he said:

I would like to make an explanation of the manner in which these things were turned out. It is generally understood that it is not a sculptor's work to make the marble—the sculptor's work is to make the model. After that is made and sold, as it is many times, the duplicate is bound to be a piece of sculpture provided the workmen are able to execute well enough to carry out the detail in this piece. Nearly all pieces are made by the artist or sculptor who makes the study or design. He may be—in most instances he is—the originator of the design, and the sculptor may have 1 or 100 workmen; but the real value comes in his being able to magnify himself through his workmen, and he may be able to get the same result.

No witness other than Garnsey had seen the importations, and whether or not he had seen all of them does not appear except as shown by the testimony we have referred to. The Government called no witnesses.

The pertinent portion of paragraph 470 is as follows:

470. * * * But the term "sculptures" as used in this act shall be understood to include only such as are cut, carved, or otherwise wrought by hand from a solid block or mass of marble, stone, or alabaster, or from metal, and as are the professional production of a sculptor only. * * *

To be entitled to the benefit of its provisions the importer must establish that these articles are sculptures; that they are cut, carved, or otherwise wrought by hand from a solid block or mass of marble or stone; and that they are the professional production of a sculptor only.

It is not denied that the witnesses were qualified to testify on the subject of sculpture or that the articles are wrought from marble.

It is argued on behalf of the importer that we ought to reverse the judgment of the board as contrary to or unsupported by the weight of evidence.

It appears therefrom that except as to the low fountain, which will be later referred to, no witnesses undertook to say what sculptor produced the articles. That *some* sculptor produced them was attempted to be shown by witnesses who had never seen the merchandise, excepting only Mr. Garnsey, whose testimony will be later and more particularly referred to, and who based their opinion to that effect upon photographs thereof. No showing was made that the best evidence, namely, the deposition or testimony of the producer himself or some one having personal knowledge thereof, as to their production, could not have been obtained. In other words, reliance in the main is had upon expert evidence to show the necessary fact, namely, that the merchandise was the professional production of a sculptor only.

The general rule relating to the probative force of such evidence upon the triers of fact is that it is only to aid them in finding what the fact is and is not conclusive. Lawson on Expert and Opinion Evidence (page 268, and cases cited).

In *The Conqueror* (166 U. S., 133), the Supreme Court said:

There is no rule of law which requires them (the triers) to surrender their judgment or to give a controlling influence to the opinion of scientific witnesses.

The Board of General Appraisers, or one of them at least, has heard the witnesses in this case and all presumably have considered their evidence. They have said with reference to it that it is uncertain and speculative and has not satisfied them that the action of the collector in assessing this merchandise was erroneous. Had we been required in the first instance to pass upon the same question we are not at all clear that we would not have reached the same conclusion.

It may be, and with good reason, that the board doubted the ability of any one of these witnesses, although testifying in good faith, to give satisfactory evidence from a photograph of an article as to whether the article was the production of a professional sculptor or a skilled artisan.

Assuming, as the evidence shows, that works of this kind must be made from a model which is a professional sculptor's creation, it must also be assumed that a skilled artisan might with his tools be able to produce a close imitation thereof, so close, indeed, that not every photograph thereof would disclose whether the artisan or the sculptor did the work or whether or not the sculptor supervised it.

It is well known that while the photographic art *may* produce vivid and realistic pictures of articles placed before the camera, yet so much depends upon position, light, shadow, skill of photographers, and perfection of the apparatus in each case that it can hardly be said as a matter of law that photographs like these, which show but one view or presentation of the object, furnish a sufficient representation thereof to enable one, however skilled as a sculptor or as a judge of sculpture, to declare from an inspection of a given photograph that it is the production of a professional sculptor only. A photograph taken with the camera in a different position, showing a different view of the article, might reveal evidence that on the whole the artisan and not the professional sculptor produced the original.

Opinion evidence of this kind, if it is admissible on such an issue as we have here, which is by no means conceded, must in the very nature of things be uncertain, and should be carefully scrutinized, notwithstanding the witness himself may have no doubt as to the correctness of his opinion. If such evidence is admissible its office is only to aid the triers to form their opinion upon the very question as to which the witness is permitted to express the opinion which he entertains.

It is not of the class of testimony given by the person who produced the article. Such evidence if credible and not rebutted might, if disregarded by the triers, be a ground for and demand a reversal.

No reason appears in this case why such evidence was not offered, nor does it appear why typical exhibits were not produced.

As to the low fountain, concerning which Mr. Garnsey testified that one Lenzi, a professional sculptor, was the sculptor thereof, no different conclusion can be reached than as to the other articles. The witness did not undertake to say that of his own knowledge he knew whether the sculptor did any more than to make the model of the fountain; that is, he could not say whether after the model thereof was made, the work was or was not executed by an artisan rather than by a sculptor, or whether the sculptor supervised the work if the artisan did it. He only gave it as his *opinion* that this fountain, like the other articles, was the production of a professional sculptor.

As to the low fountain, he further testified that it, as well as one other article, was imported in duplicates. Mr. Gardner testified that works of this character, referring to the photographs generally, were made in large quantities; that he had seen them in this country. From this evidence it is not clear that the low fountain as well as the other merchandise was not in fact the product of skilled artisans, produced in quantities in the course of a business to meet a commercial demand, which class of merchandise we have held did not come within the paragraph. *Downing v. United States* (3 Ct. Cust. Appls., 473; T. D. 33043).

As was held in *Lazarus v. United States* (2 Ct. Cust. Appls., 508; T. D. 32247), the manifest purpose of Congress in providing for the low rate of duty under paragraph 470 was "to protect the labor and industrial arts of this country against the competition of similar and cheaper labor of foreign countries," and upon the other hand "to permit in the interest of art and education the introduction into this country at a low rate of duty such sculptures as are the product of a higher order of skilled and artistic conception."

As we have said in other cases where claim was made under this paragraph, the importation *may* be entitled to its benefit, but the burden of so showing is upon the importer.

The board has found in this case that the importer has not discharged this obligation and we are not justified in reversing its action.

The judgment of the Board of General Appraisers is *affirmed*.

UNITED STATES *v.* DAVIES, TURNER & Co. *et al.* (No. 1293).¹

1. A CHEMICAL COMPOUND—GROUND ORE NOT.

There must be some artificial mixture of chemicals or artificial compounding of substances to produce a chemical compound or chemical mixture. A natural ore which has received no treatment except to be mechanically ground is not a chemical compound or mixture.

2. CRUDE MATERIALS ADVANCED IN CONDITION BY GRINDING.

This merchandise is not arsenic, and neither is it an acid or a sulphide of arsenic, but as a crude ore, being advanced in condition, it is not entitled to free entry. It falls within paragraph 480, tariff act of 1909, as a nonenumerated partly manufactured article.

United States Court of Customs Appeals, March 25, 1914.

APPEAL from Board of United States General Appraisers, Abstract 33749 (T. D. 33778).

[Reversed.]

William L. Wemple, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, of counsel; *Charles D. Lawrence*, special attorney, on the brief), for the United States.

Brown & Gerry for appellees.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

BARBER, Judge, delivered the opinion of the court:

The subject of these appeals is a natural ore mined in southern France. Before importation it was ground for the purpose of facilitating the reduction of its contents. When chemically analyzed it was found to consist chiefly of arsenic and antimony in the form of oxides. As to which of these was predominant the evidence is not clear to us, the board, however, finding it was oxide of arsenic. This question of predominance we do not deem important.

The merchandise as imported was in the state nature produced it, except the grinding above mentioned. The appraiser did not consider it to be commercial arsenic, and returned the ore for duty as a chem-

¹ Reported in T. D. 34325 (26 Treas. Dec., 554).

ical mixture under paragraph 3 of the tariff act of 1909. The importers protested, claiming it was entitled to free entry under one of the following paragraphs:

482. Acids: Arsenic or arsenious, * * *.

497. Arsenic and sulphide of arsenic, * * *.

626. Minerals, crude, or not advanced in value or condition by refining or grinding, or by other process of manufacture, * * *.

or, in the alternative, if the above paragraphs were found to be inapplicable, that it was dutiable at 10 or 20 per cent ad valorem under paragraph 480 of the same act. The Board of General Appraisers upon hearing held the merchandise was entitled to free entry under paragraph 482.

In its brief and argument the Government does not suggest any good reason for sustaining the collector's assessment, but confines itself to pointing out that importers' claim for free entry under any of the paragraphs quoted ought not to have been sustained.

On the other hand, the importers are unable to present any cogent reason for sustaining the board's decision.

We do not think the collector's assessment was correct, because paragraph 3, which it is unnecessary to quote, does not relate to wholly natural products such as the ore in this case, but, in the part relied upon for the assessment, refers to *chemical compounds and mixtures*. The fair implication of this language, in view of its context, is that there must be some artificial mixture of chemicals or artificial compounding of substances to produce a chemical compound and that a natural ore which has received no treatment whatever except the mechanical one of grinding is not within the paragraph. To hold otherwise would subject a large variety of articles imported in a state of nature to the paragraph, an unwarranted result, we think and one not contemplated by Congress.

We do not think either paragraph 482 or paragraph 497 is applicable, because the evidence shows that the merchandise is not arsenic and neither is it an acid nor a sulphide of arsenic. The importers' main contention for free entry is based upon paragraph 626, in that, as they claim, these ores are crude minerals. But the language of the paragraph excludes crude minerals if they have been advanced in value or condition by grinding or refining. Concededly these ores have been ground, and although the constituents have not been segregated, the grinding was for the purpose of facilitating the reduction of the contents, thereby clearly advancing the condition of the ores and doubtless also advancing their value, thereby, as we think, excluding them from the paragraph.

The importers here contend, if none of the free-entry paragraphs be found applicable, that the merchandise is within the provisions of paragraph 480 and dutiable thereunder at 20 per cent ad valorem as a nonenumerated partly manufactured article, and we think this

claim should be upheld. As stated, the ore is in its crude natural condition except for the fact that it has been ground. Grinding is one of the processes which is expressly mentioned as a manufacturing process in paragraph 626, and it has advanced the condition and probably the value of the merchandise. The logical conclusion therefore is, no other applicable statute having been pointed out, that it is dutiable under paragraph 480 as a nonenumerated article partly manufactured. That paragraph having been invoked in the importers' protest, and the conclusion reached being that neither the collector's assessment nor that ordered by the board can be sustained, the result is that the judgment of the Board of General Appraisers is *reversed*, with direction that the entries be reliquidated in accordance with the views herein expressed.

UNITED STATES *v.* QUONG CHUN & Co. (No. 1295).¹

EVIDENCE IN ONE CASE EMPLOYED TO DETERMINE ANOTHER.

The testimony relied upon as taken in a former case should have been, after due notice, ordered into the record here. Failure to do this was a substantial irregularity, since it deprived Government's counsel of the opportunity to present opposing testimony.—United States *v.* Lun Chong (3 Ct. Cust. Appls., 468; T. D. 33041).

United States Court of Customs Appeals, March 25, 1914.

APPEAL from Board of United States General Appraisers, Abstract 33806 (T. D. 33789) [Reversed.]

William L. Wemple, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, of counsel; *William A. Robertson*, special attorney, on the brief), for the United States.

Submitted on record by appellee.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

The merchandise in this case consists of human hair, which was assessed for duty under paragraph 442 of the tariff act of 1909 as human hair, cleaned and drawn, but not manufactured, at 20 per cent ad valorem. The board sustained the protest, which claimed the goods entitled to free entry under paragraph 583, which provides for human hair, raw, uncleaned, and not drawn. No testimony was introduced on the hearing. The board in deciding the case held:

The collector in his report states that the merchandise in question is represented by a sample in Chee Chong & Co.'s case, Abstract 33188 (T. D. 33660), protest 581114. The testimony taken at the trial of that case shows that the sample was uncleaned and undrawn. Following Chee Chong & Co.'s case, *supra*, the protests are sustained and the collector directed to reliquidate the entries admitting the hair free of duty.

It would appear that the board relied upon the testimony taken in a former case in deciding the present case, and this action is assigned as error.

¹ Reported in T. D. 34326 (26 Treas. Dec., 556).

The same question was presented to this court in *United States v. Lun Chong* (3 Ct. Cust. Appls., 468; T. D. 33041), in which case it was held that the questions of fact arising in a case must be determined upon the record in that particular case, and that inasmuch as the only evidence found in the record which went to sustain the board consisted of bare samples, and the court was unable to determine from the samples any fact which justified overturning the action of the collector, error was committed.

The same reasoning applies to the present case. It would have been better practice for the board, upon finding itself called upon to rely upon evidence in any other case, to have acted under its rules and ordered this testimony into the record, giving a proper notice to the Government attorneys. We assume that the failure to do this was an oversight, and we are compelled to hold that this irregularity is substantial, as it deprived Government's counsel of the opportunity to present opposing testimony.

We are unable to determine from an inspection of the sample that the importation consists of human hair, uncleaned and not drawn. We are constrained, therefore, to *reverse* the decision of the board and *affirm* the action of the collector.

LANG V. UNITED STATES (No. 1303).¹

1. PRINTING PRESS.

A printing press is a machine used in letter-press printing on paper and like substances, and is designed to produce books, newspapers, magazines, circulars, handbills, and the like.

2. MECHANISM FOR MARKING COLLAPSIBLE METAL TUBES.

The article here, a printing mechanism for lacquering and marking collapsible metal tubes, is not used by "the art or trade of letter-press printing," and it was properly assessed as a manufacture of metal not specially provided for under paragraph 199, tariff act of 1909.

United States Court of Customs Appeals, March 25, 1914.

APPEAL from Board of United States General Appraisers, Abstract 33883 (T. D. 33795).

[Affirmed.]

Brown & Gerry for appellant.

William L. Wemple, Assistant Attorney General (*Martin T. Baldwin*, special attorney, of counsel; *Thomas J. Doherty*, special attorney, on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MARTIN, Judge, delivered the opinion of the court:

The present merchandise consists of a machine which prints or stamps labels upon collapsible metal tubes such as are used for holding toilet pastes of various kinds. The appraiser returned the same

¹ Reported in T. D. 34327 (26 Treas. Dec., 557).

for duty at 45 per cent ad valorem under paragraph 199 of the tariff act of 1909 as a manufacture of metal not specially provided for, and duty was assessed thereon in accordance with this return.

The importer filed his protest against the assessment, claiming the article to be a printing press, dutiable under that name at 30 per cent ad valorem under the provisions of paragraph 197 of the act of 1909.

The protest was submitted upon evidence to the Board of General Appraisers and was overruled, from which decision the importer now appeals.

The following is a copy of paragraphs 197 and 199 of the tariff act of 1909:

197. Cash registers, jute manufacturing machinery, linotype and all typesetting machines, machine tools, printing presses, sewing machines, typewriters, and all steam engines, thirty per centum ad valorem; embroidery machines and lace-making machines, including machines for making lace curtains, nets, or nettings, forty-five per centum ad valorem: *Provided, however,* That all embroidery machines and Lever or Gotherough lace-making machines, machines used only for the weaving of linen cloth from flax and flax fiber, and tar and oil spreading machines used in the construction and maintenance of roads and in improving them by the use of road preservatives, shall, if imported prior to January first, nineteen hundred and eleven, be admitted free of duty.

199. Articles or wares not specially provided for in this section, composed wholly or in part of iron, steel, lead, copper, nickel, pewter, zinc, gold, silver, platinum, aluminum, or other metal, and whether partly or wholly manufactured, forty-five per centum ad valorem.

The sole question presented by the case is whether the present article is a printing press within paragraph 197 above copied. If it is a printing press the protest should have been sustained, otherwise it was correctly overruled.

The machine in question contains a cylinder upon which is clamped a rubber mat or pad bearing the words and designs which are to be printed upon the collapsible metal tubes. By the action of certain rollers, this pad is evenly supplied with paint of one or more colors. The collapsible metal tube which is to be printed is placed in the machine upon a revolving form. This form holds it in its tubular shape and at the same time brings it in contact with the paint-bearing rubber mat. By means of this impression the tube is stamped or printed with the words and designs borne by the rubber mat. The machine in question can not be used with metal types or adjustable rubber letters or designs, nor can it be operated so as to print upon any flat surface. Nor can ink be used as the printing medium upon the machine, the process requiring paint or lacquer. The machine would not be useful for printing upon cardboard or paper, and probably would not print upon paper at all. It is constructed of metal and may be operated either by hand or by power.

As already stated, the sole question made by the present record is whether the machine just described is a printing press. The following definitions will aid in answering this question.

Oxford Dictionary:

Printing press. An instrument or machine for printing on paper, etc., from types, blocks, or plates.

Press. sb.

13. A machine for leaving the impression of type upon paper, vellum, or other smooth surface; a machine for printing, a printing press.

Century:

Printing press, n. A machine for taking impressions from an inked surface upon paper.

Worcester:

Printing press, n. A press for printing books, newspapers, etc.

Standard:

Printing machine, n. Any machine for printing, as on cotton cloth; particularly, an elaborate machine for doing fine or rapid printing, as on paper; a printing press.

Printing press, n. 1. Same as printing machine. 2. A mechanism for printing operating by pressure, as the Adams *printing press*.

In the case of *Petry v. United States* (3 Ct. Cust. Appls., 348; T. D. 32906), this court, speaking through Judge Smith, commented upon the foregoing definition of the Standard Dictionary, and adopted a definition of the disputed term in the following language:

The Standard Dictionary does say that the expressions "printing press" and "printing machine" are used interchangeably. Nevertheless, we take judicial notice of the fact that while every printing press may be correctly referred to as a printing machine, not every printing machine can be properly called a printing press. As commonly and generally understood, printing presses are those printing machines which are chiefly used by the art or trade of letter-press printing on paper and like substances and which are designed and intended to produce such printed matter as books, newspapers, magazines, periodicals, circulars, handbills, etc.

In comparing the foregoing definitions with the actual article at bar the court concludes that the present machine is not a printing press, notwithstanding the fact that it makes a printed impression upon the collapsible metal tubes. It will be observed that the Century definition, above given, limits the term "printing press" to such machines only as make impressions from an inked surface upon paper. It will be noted that the present machine can not use either ink or paper. The Worcester definition, above copied, applies the term in question to such presses only as print books, newspapers, etc. The present machine, however, can not print books or newspapers, nor anything which generically stands in association with such printed articles. The Oxford definition, above given, applies the disputed term to such machines as print upon paper, vellum, or other smooth surface from types, blocks, or plates. In respect to the

present article, however, the rubber pad or mat can not fairly be called "types, blocks, or plates," nor can the collapsible metal tubes be called "paper, vellum, or other smooth surface." The present machine, therefore, is thus excluded from each of the definitions just referred to.

The definition given by the Standard is, indeed, broader than those already noted, but that definition was not followed by this court in the Petry case, *supra*, wherein the court said that "as commonly and generally understood, printing presses are those printing machines which are chiefly used by the art or trade of letter-press printing on paper and like substances, and which are designed and intended to produce such printed matter as books, newspapers, magazines, periodicals, circulars, handbills, etc." The machine now at bar is also excluded from the terms of the foregoing definition; for it is not "used by the art or trade of letter-press printing;" it does not print at all upon paper or like substances; it is not designed to produce such printed matter as is specified in the given definition nor any printed matter which generically belongs therewith.

The present article therefore is properly a machine which operates a rubber stamp, rather than a printing press; and in this view of the case the decision of the board was correct and the same is *affirmed*.

UNITED STATES *v.* BERNARD, JUDAE & Co. (No. 1314).¹

1. CERTAIN BEADED BRACELETS NOT TOYS.

These bead bracelets are cheap in material and construction, but they are intended for use by children as articles of personal adornment and are so used. They are not used in the sport or play of children and so are not toys.—*Illfelder v. United States* (1 Ct. Cust. Appls. 109; T. D. 31115).

United States Court of Customs Appeals, March 25, 1914.

APPEAL from Board of United States General Appraisers, Abstract 33968 (T. D. 33833).

[Reversed.]

William L. Wemple, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, of counsel; *Leland N. Wood*, special attorney, on the brief), for the United States,

Isidore Fried for appellees.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MARTIN, Judge, delivered the opinion of the court:

The merchandise involved in the present appeal consists of certain bead bracelets, which were imported under the tariff act of 1909. The articles are of flimsy construction and are invoiced at only 6.25

¹ Reported in T. D. 34328 (26 Treas. Dec., 560).

kroner per gross. The appraiser reported them to be in chief value of beads and designed to be worn for personal adornment, mainly by children. They were returned for duty at 60 per cent ad valorem as articles in chief value of beads under paragraph 421, or alternatively as articles of personal adornment and jewelry under paragraph 448, the rate of duty being the same under both provisions. The importers duly filed their protest against this assessment, claiming the articles to be toys, dutiable as such at 35 per cent ad valorem under the provisions of paragraph 431 of the act. The protest was sustained by the Board of General Appraisers, and the Government now appeals from that decision of the board.

The present record contains no testimony of any kind, the case having been submitted to the board upon the official files and the samples alone. This court, therefore, is also limited to these sources of information concerning the merchandise involved in the case.

The bead bracelets in question are certainly very cheap and flimsy, both in materials and construction. Nevertheless, they are not designed as parts of a doll's outfit, but are intended for practical use by children as articles of personal adornment, and they are actually used for that purpose. This statement effectually removes the bracelets from classification as toys, for an article, however cheap, can not be a toy unless it enters in some manner into the sport or play of children. The definition of the term "toy" is fully set out in the decision of this court in the case of *Illfelder v. United States* (1 Ct. Cust. Appls., 109; T. D. 31115) relating to so-called sparklers, wherein Judge Smith, speaking for the court, said:

In common speech, and as popularly understood, a toy is essentially a plaything, something which is intended and designed for the amusement of children only, and which by its very nature and character is *reasonably* fitted for no other purpose. Although an article may be chiefly used for the amusement of children, if its nature and character are such that it is also reasonably fitted for the amusement of adults, or if it is reasonably capable of use for some practical purpose other than the amusement of children, it can not be classed as a toy unless it is affirmatively shown by the importer that it is so known and designated by the trade generally.

The bracelets involved in the present case are certainly not playthings, but are simply cheap articles of personal adornment designed for actual use as such. Their cheapness, however, taken alone, does not entitle them to classification as toys, in view of the practical use to which they are actually put. It may be noted again that no testimony has been submitted in the case and that the question of commercial designation does not arise.

The decision of the board is therefore *reversed*.

LEWISOHN IMPORTING & TRADING CO. v. UNITED STATES (No. 1323).¹**VALIDITY OF REAPPRAISEMENT.**

The feathers of the importation were bought at public auction in London on terms that allowed a discount for payment in cash, and the invoice showed the total value less the discount for cash. Whether this discount was to be included in the dutiable value of the merchandise was a question of law, not one of fact. The case is ruled by *Arthur v. Goddard* (96 U. S., 145).

United States Court of Customs Appeals, March 25, 1914.

APPEAL from Board of United States General Appraisers, Abstract 34323 (T. D. 34024).

[Reversed.]

Hatch & Chute for appellant.

William L. Wemple, Assistant Attorney General (*William A. Robertson*, special attorney, on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

DE VRIES, Judge, delivered the opinion of the court:

This appeal brings up for determination the question of the legality of a reappraisement proceeding. The importation was one of feathers purchased at public auction held by the General Produce Brokers' Association in London. The invoice, in so far as pertinent, recites:

| | | | |
|---|--------|----|---|
| Total invoice value..... | £7,990 | 10 | 0 |
| Lot money, 129 lots at 1s..... | 6 | 9 | 0 |
| Brokerage $\frac{1}{2}$ per cent..... | 39 | 19 | 0 |
| | 8,036 | 18 | 0 |
| Less cash discount, 14 days, at 5 per cent per annum..... | 15 | 8 | 3 |
| | 8,021 | 9 | 9 |

(Appraiser's notation:) Appraiser advances to make market value by disallowing this deduction.

Without indulging unwarranted incredulity these facts alone, which are corroborated by every other part of the record, plainly evidence a certain gross price paid, from which a cash discount was in fact and on invoice and entry deducted and the net price stated on the invoice as the invoice price, and so entered, and thus the amount and relation of the cash discount is clearly fixed by the record. Whether or not the action of the single general appraiser is considered, the invoice and above matters were properly before the board on reappraisement.

The goods were entered at the value less the cash discount. The local appraiser advanced the invoice by disallowing this discount. Upon appeal to the single general appraiser that action was reversed. Upon further appeal by the Government to the board of three general appraisers the action of the single general appraiser was reversed and

¹ Reported in T. D. 34329 (26 Treas. Dec., 561).

that of the local appraiser affirmed. The notation made by the board, as recited in the record, was, in so far as pertinent:

Crude feathers. Prices as invoiced. Add lot money and brokerage as invoiced. Add cases as entered. Add pkg. and warehouse del'y as entered.

On reliquidation pursuant to this board decision the importers protested, alleging that "the Board of United States General Appraisers proceeded upon a wrong theory and contrary to law in disallowing the 5 per cent discount deducted on entry." The board overruled this protest in the following language:

There is nothing in the record before us which in any way indicates that the board acted in an illegal or unlawful manner, and without proof that they so acted the importer can not prevail here.

Subsection 13 of section 28 of said act, which was in force when the above-mentioned proceedings took place, provides that a reappraisement by the board becomes final and conclusive against all persons interested therein and is not subject to review in any manner for any cause in any tribunal or court.

The Court of Customs Appeals in *Wolff v. United States* (1 Ct. Cust. Appls., 181; T. D. 31217), affirming ruling of the board in *G. A. 6888* (T. D. 29628), held that a finding by a board of general appraisers on the actual market value of merchandise is conclusive against all parties and can not be disturbed.

The protests are accordingly overruled.

These recitations make it plain that the Board of General Appraisers in deciding the protest deemed the addition of the cash discount by the board of three general appraisers in the re-appraisement proceeding the determination of a question of fact. The theory of the Government upon this appeal, both in its brief and at the oral argument, is likewise founded.

At the hearing before the re-appraisement board the only facts submitted to them was the record in the reappraisement cases, consisting of the invoice, as above quoted, and the entry with the remaining portions of the record below, together with a copy of the rules and regulations of the General Produce Brokers of London governing the sales of feathers and the testimony of one John Ostermann. The board certifies that that "is all the evidence offered or received in the case."

It is made to appear from the record that the feathers, which are sold at public auction, are sold upon the terms that if paid for within 14 days after the Saturday following the sale there is a cash discount at the rate of 5 per cent per annum. Unless paid for within said 14 days the discount is not allowed. All of the sales of feathers made at public auction by this association at London are made upon this basis and in conformity with the said rules and regulations.

We think it satisfactorily appears from the record in the case of these importations that the importers availed themselves by immediate payment of the cash discount and it was so entered upon the invoice and deducted accordingly. While in the briefs and at the

oral argument allied questions were argued, this record presents for decision but one question. That question is, In such cases where immediate payment is made and the cash discount allowed, what is the dutiable value of the merchandise? Allied therewith, but not presented for decision in this case, but argued in the briefs and at the oral argument is the question, What would be the dutiable value in a case where cash was not paid but advantage was taken of the 14 day's limitation? That question, though discussed, is not presented by this record for decision, and we have perhaps the simpler issue, as stated, for decision.

Primarily, is the question whether the allowing or disallowing of this discount by the appraising officers is the finding of a fact or the decision of a question of law. The Board of General Appraisers, in its opinion, relying upon the authority of a decision of this court in *Wolff v. United States* (1 Ct. Cust. Appls., 181; T. D. 31217), held this determination to be one of fact. The Government in its brief and at the oral argument took the same position. Were this true, an affirmance of the board would necessarily follow. We do not, however, take that view of the case. The allowance or disallowance of a cash discount, upon basic value of merchandise, in the nature of interest, dependent in amount upon the time of payment, and whether or not the same enters into the dutiable value of the merchandise, is a matter of legal determination.

The precise question was involved in *Arthur v. Goddard* (96 U. S., 145), decided by the Supreme Court. The question there involved was a cash discount of 2 per cent. Of this the Supreme Court said:

In this case the appraisers did not profess to appraise or ascertain the market value of the goods. They simply gave a construction to the invoice; they decided its legal effect to be that 8,670.25 francs is there declared to be the market value of the goods. They held as a legal proposition that, in fixing the value, the discount of 2 per cent should not be allowed, and as a result from this that 8,670.25 francs, and not 8,494.95 francs, was the value.

There seems to be no distinction in principle between the action of the appraisers in that case and in this. The facts being made clear by the record, the appraising board simply recites in its findings, "Prices as invoiced." This was not a finding of fact that the actual market value of the merchandise was of one valuation or another. That is to say, it is neither a finding that 8,036 pounds 18 shillings nor that 8,021 pounds 9 shillings 9 pence, both of which are recited in the invoice, is the actual market value of the merchandise, but a legal determination, if anything more than a recital of the correctness of the invoice, that the discount should be included within the dutiable value of the merchandise.

We think that decision of the Supreme Court rules the question in this case, whether or not the allowing or disallowing of the discount is a determination of a question of fact or the decision of a

legal principle. Being of the opinion that it is of the latter character jurisdiction vests in the court for the determination of whether or not this cash discount should or should not be added in order to make up the dutiable value of the merchandise. *United States v. Spingarn Bros.* (5 Ct. Cust. Appls., —; T. D. 34002); *Arthur v. Goddard* (96 U. S., 145).

The question before the court then is, in the cases of sales such as these, which are at public auction and to the highest bidder, where the goods are freely offered to all comers upon the same terms, and are sold and delivered to whomsoever purchases and pays cash at a price represented by the knockdown price at the auction less 5 per cent per annum for cash, what is the dutiable value of such merchandise? We think that question affecting only a cash transaction, such as the record discloses this sale and purchase to have been, is ruled by the decision of the Supreme Court in the case cited, *supra*, *Arthur v. Goddard*. The case was different essentially from *Ballard et al. v. Thomas* (19 How., 60 U. S., 382), as set forth in the former decision. In that case the purchase price of the goods was 8,670.25 francs. A cash discount of 2 per cent was claimed and noted upon the invoice. The invoice likewise recited the net price of the goods to be 8,494.95 francs. The goods were entered at the net price. The court stated:

The actual value has been stated at 8,494.95 francs, and such was also the "invoice value." The entered or invoice value spoken of in the statute means the value as it is stated in or upon the invoice. That value was 8,494.95 francs. The value means the cash value. The price at 30 days' credit might be different, and the difference would probably be greatly increased by a credit of six months or a year, but the value or cost would still be the same. The difference would be chargeable to the credit and not to a difference in the value of the goods. That the price was to bear interest at 6 per cent until paid for, or at 60 per cent, had no influence upon the question of value. We think it quite clear that the net price is stated in this invoice to be the value of the goods, viz, 8,494.95 francs.

In that case as here both the gross and net values were set out in an invoice which clearly disclosed the exact terms of the sale and purchase. While there are some differences in the statute there under consideration and here, they are not such as in our opinion would affect such a transaction as this, which was for cash. Any further consideration is not here properly the subject of decision.

It seems pertinent to say that it is clear to us, however, that in this as in the case of *Arthur v. Goddard, supra*, where an invoice sets out the entire transaction—gross price, rate, and amount, and terms of discount claimed, and net price, all fully extended upon the invoice—that it can not be said that a finding of "prices as invoiced" is a finding of fact that one or the other of such invoice prices is actual market value, or that the determination of the board that such an invoiced discount should or should not be disallowed was other than as said in *Arthur v. Goddard, supra*, "a construction of the invoice."

Reversed.

UNITED STATES *v.* MEIER & FRANK CO. (No. 1338).¹**KINDERGARTEN EMBROIDERY SETS—TOYS.**

These embroidery sets that are used in kindergarten work are essentially toys, useful only for the amusement of children, whether with or without accompanying instruction.

United States Court of Customs Appeals, March 25, 1914.

APPEAL from Board of United States General Appraisers, Abstract 34400 (T. D. 34033).

[Affirmed.]

William L. Wemple, Assistant Attorney General (*Leland N. Wood*, special attorney, of counsel; *Martin T. Baldwin*, special attorney, on the brief), for the United States. Submitted on record by appellees.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MARTIN, Judge, delivered the opinion of the court.

The merchandise now in question consists of certain embroidery sets intended for use in kindergarten schools. Each set consists of a number of pieces of cotton cloth, cardboard, and colored yarns, with various printed patterns and some completed samples of embroidery work, the whole loosely fastened together in a pasteboard box. The so-called cotton cloth is composed of very heavy single transverse threads which form large open interstices. Through these the colored yarn is carried so as to form embroidered figures in imitation of the given patterns. In most cases the yarn could easily be recovered from the finished figures so as to be worked over again into other patterns upon the same cotton frame, but the materials are so cheap that there would probably be little advantage in this. The sets are used in kindergarten schools for the amusement of small children and their instruction in simple embroidery.

Duty was assessed upon the importation at the rate of 60 per cent ad valorem under the provision for embroideries and embroidered articles contained in paragraph 349 of the tariff act of 1909. The importers duly filed their protest against that assessment, claiming the sets to be toys, dutiable as such at the rate of 35 per cent ad valorem by force of paragraph 431 of the same act.

The protest was submitted upon evidence to the Board of General Appraisers and was sustained, from which decision the Government now appeals.

The following is a copy of the relevant parts of paragraph 349 and of all of paragraph 431 of the tariff act of 1909:

349. Laces, * * * embroideries, * * * wearing apparel, handkerchiefs, and other articles or fabrics embroidered in any manner by hand or machinery, whether with a plain or fancy letter, initial, or monogram, or otherwise, * * * ; all of the foregoing, composed wholly or in chief value of cotton, flax, or other vegetable fiber, * * * and not elsewhere specially provided for in this section, sixty per centum ad valorem: * * *

¹ Reported in T. D. 34330 (26 Treas. Dec., 565).

431. Dolls, and parts of dolls, doll heads, toy marbles of whatever materials composed, and all other toys, and parts of toys, not composed of china, porcelain, parian, bisque, earthen or stone ware, and not specially provided for in this section, thirty-five per centum ad valorem.

The following definition of "toys" was written by Judge Smith for this court in the case of *Illfelder v. United States* (1 Ct. Cust. Appls., 109; T. D. 31115), and the same is approved as authoritative in the present case:

In common speech, and as popularly understood, a toy is essentially a plaything, something which is intended and designed for the amusement of children only, and which by its very nature and character is *reasonably* fitted for no other purpose. Although an article may be chiefly used for the amusement of children, if its nature and character are such that it is also reasonably fitted for the amusement of adults, or if it is reasonably capable of use for some practical purpose other than the amusement of children, it can not be classed as a toy unless it is affirmatively shown by the importer that it is so known and designated by the trade generally.

The sole question raised by the present record is whether the articles above described are toys according to the definition just above copied. The board held upon the evidence that the articles are toys within that definition.

It is conceded that the articles in question are part of the usual equipment of kindergarten schools in this country. This fact, however, is not entitled to have a controlling effect upon the present case, for it can not be said that the use of an article in a kindergarten school would effectually prove that the article itself either is or is not a toy. It is certainly the case that some of the articles which are used in such schools are toys and that some are not, and in each case the essential character of the given article would remain the same regardless of such use. For example, it may safely be said that blocks bearing pictures or letters of the alphabet or other designs, intended for the amusement of children at play, are toys. The same articles, however, might also be used in kindergarten work for the combined amusement and instruction of small children and nevertheless retain their character as toys. In such a case the school would simply be making use of children's games as means of combined amusement and instruction, and articles thus used would not be excluded from the accepted definition of toys as being "reasonably capable of use for some practical purpose other than the amusement of children." It is indeed well known that this is the principle upon which kindergarten schools are established, namely, the teaching of useful lessons to very young children by means of games and playthings. This fact is exemplified by the following definition:

Standard:

Kindergarten. A school for little children in which instructive diversions, object lessons, and healthful games are prominent features.

Therefore if the articles used in such schools are toys when used outside of the school they would remain toys when used inside of the school; otherwise the same articles upon importation would be dutiable as toys if intended for general sale, but not dutiable as toys if intended for use in a kindergarten.

The present merchandise was assessed as embroidery or embroidered articles. The sets, however, are so juvenile in character that they serve none of the serious or practical purposes of embroideries; the embroidered pieces are neither useful nor ornamental in that character. They can not become parts of wearing apparel or household furnishings or other useful or ornamental articles; they really find their natural and proper place in a child's playhouse along with dolls and like playthings. If they were not used in kindergarten work, the sets would probably be classified as toys without question. Indeed, the collector himself in making his official return of the protest refers to the protested articles as "certain embroidered toys." The court is of the opinion that the sets in question are essentially toys, useful only for the amusement of children, whether with or without accompanying instruction, and in this view the decision of the board was correct and the same is *affirmed*.

UNITED STATES *v.* FLATT & Co. (No. 1292).¹

CRUDE COCO FIBERS, PROCESSED.

The appraiser found the merchandise to be partly manufactured coco fibers and there is nothing in the record to contradict his finding. The fibers of the importation had been subjected to a certain process that fitted them as materials for use in the manufacture of brushes. They were not entitled to free entry.

United States Court of Customs Appeals, April 7, 1914.

APPEAL from Board of United States General Appraisers, Abstract 33808 (T. D. 33789).

[Reversed.]

William L. Wemple, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, of counsel); *Samuel Isenackmid*, special attorney, on the brief, for the United States.

Walter Evans Hampton for appellees.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MARTIN, Judge, delivered the opinion of the court:

The merchandise involved in the present case consists of coco or cacao fiber such as is used in the manufacture of brushes.

The importation was invoiced as "raw coco fiber," and free entry was claimed for it under the provision for coco or cacao fibers contained in paragraph 540 of the tariff act of 1909. The appraiser, however, reported the article to be "coco fiber, dressed, cut into uniform lengths and bunched, ready for use in the manufacture of brushes." Return for duty was made as a nonenumerated

¹ Reported in T. D. 34379 (26 Treas. Dec., 630).

article, partly manufactured, dutiable at 20 per cent ad valorem, under paragraph 480 of the act, and duty was assessed in accordance with this return.

The importers duly filed their protest against the assessment, presenting their claims for the free entry of the merchandise in the following terms:

The ground of objection under the tariff act of August 5, 1909, is that said merchandise should be free of duty as coco fiber, crude, under paragraph 540.

The protest was submitted to the Board of General Appraisers, and the board sustained the same in the following decision:

The appraiser reports that the merchandise in this case consists of fiber cut into uniform lengths and bunched. Duty was assessed at 20 per cent under paragraph 480 of the tariff act of 1909, and the merchandise is claimed to be free as coco fiber, crude, under paragraph 540. Following the decision of this board in Osborne Manufacturing Co.'s case, Abstract 30026 (T. D. 32858), the protest is sustained and the collector directed to reliquidate the entry admitting the merchandise free of duty.

For convenience of reference at this point the following copy is given of the abstract decision referred to in the foregoing opinion:

Bass fiber cut into specified lengths, assessed under paragraph 480, tariff act of 1909, held to be crude, free of duty (par. 630).

The Government appealed from the decision of the board reversing the collector's assessment, and the question is thus presented to the court, whether upon the present record the merchandise in question is entitled to free entry under paragraph 540 of the tariff act of 1909. The following is a copy of that paragraph:

(Free list.)

540. Cocoa, or cacao, crude, and fiber, leaves, and shells of.

As appears from the foregoing statement, both of the parties to this issue and also the board construe paragraph 540, *supra*, to grant free entry to crude coco fiber only. Upon this construction of the paragraph the importers invoiced and entered the present article under the description of "raw coco fiber," claiming its free entry as such. Upon the same construction the collector refused free entry to the merchandise, the appraiser having reported that the same was not "raw coco fiber," but was "dressed, cut into uniform lengths, and bunched, ready for use in the manufacture of brushes." Acting upon the same construction of the paragraph the board held the article to be free as coco fiber, crude, basing this conclusion upon a similar decision relating to bass fiber. This court for the purposes of this case accepts the same construction of the paragraph in question, and therefore the only question in the case is whether upon the present record it sufficiently appears that the present article is crude coco fiber.

There is no testimony submitted by either party at the trial before the board, therefore the character of the merchandise in question appears only from the official sample and the report of the appraiser.

The official sample consists of a small bundle of coco fibers of exactly even lengths held together by a band of heavy paper. As above stated, the appraiser reported these to be "coco fiber, dressed, cut into uniform lengths, and bunched ready for use in the manufacture of brushes." The report of the appraiser is, of course, presumed in the first instance to be correct, and an inspection of the official sample does not lead the court to doubt the correctness of the same. It must therefore be accepted that the present merchandise does not consist of coco fibers in the condition in which they first attained to that name and character, but fibers which, after they had already attained to the name and character of coco fibers, were subjected to a treatment which fitted and appropriated them to a special industrial use, namely, the manufacture of brushes. Just what this treatment was does not appear from the record. It is simply recited by the appraiser that the fibers were "dressed," as well as cut and bunched; but this statement fairly implies that a substantial change was made in the article from its original condition as coco fibers. This is evidently the meaning intended to be conveyed by the appraiser, for the fact is recited as the basis for the proposed assessment of the merchandise as partly manufactured coco fibers, thus denying them admission as crude coco fibers only.

In the entire absence of testimony tending either to contradict or explain the appraiser's report, the court is constrained to accept the foregoing interpretation of it as conclusive of the issue. The merchandise at bar appears, therefore, to be not crude coco fibers or coco fibers only, but such fibers after being subjected to a certain process which has fitted and appropriated them as materials for the manufacture of brushes, and in this view the collector's assessment should be sustained.

The decision of the board is therefore *reversed*.

UNITED STATES *v.* BROWN & Co. 1298).¹

DICED LEATHER NOT EMBOSSED LEATHER.

The leather of the importation does not present the appearance of raised figures in relief upon its surface, nor has it been subjected to processes aimed to produce such a result. The article is not embossed or gaufrage, but diced leather.—*Dejonge v. United States* (3 Ct. Cust. Appls. 463; T. D. 33040) distinguished.

United States Court of Customs Appeals, April 7, 1914.

APPEAL from Board of United States General Appraisers, Abstract 33862 (T. D. 33795).

[Affirmed.]

William L. Wemple, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, of counsel; *Frank L. Lawrence*, special attorney, on the brief), for the United States.

Brown & Gerry for appellees.

Before MONTGOMERY, SMITH, BARBER, DE VRIES and MARTIN, Judges.

¹ Reported in T. D. 34380 (26 Treas. Dec., 632).

MARTIN, Judge, delivered the opinion of the court:

The merchandise now in question is dressed leather ornamented upon its grain side with a diced effect, the leather being such as is used in making hat sweats.

The appraiser returned the merchandise as skivers, dressed, finished, and gauffed, subject to a primary duty of 15 per cent ad valorem as "other leather," and also to a cumulative duty of 10 per cent ad valorem as "gauffre leather" under the provisions of paragraph 451 of the tariff act of 1909. Duty was assessed upon the merchandise at the combined rate of 25 per cent ad valorem, in accordance with this return.

The importers duly filed their protest against the assessment, claiming that the leather in question was not gauffre leather, and that the same was dutiable only at the primary rate of 15 per cent ad valorem under paragraph 451, without the addition of the cumulative rate of 10 per cent ad valorem imposed by that paragraph upon gauffed leathers.

The protest was submitted upon evidence to the Board of General Appraisers and the same was sustained. The Government now appeals from that decision.

The sole question in the case therefore is whether the present leather is gauffed. If it is gauffre leather the collector's assessment was correct; if it is not gauffed the assessment was erroneous and the board's decision reversing the same should be affirmed. The character of this issue makes it unnecessary to copy paragraph 451 of the tariff act of 1909, since the question at bar is one of fact only.

The leather in question consists of whole sheepskins which have been split, tanned, and dressed, and then subjected to an ornamental process known as dicing. For this purpose the skin is fastened upon a revolving drum and lines are traced upon its surface by means of pressure from an edged disk. These lines cover the entire surface of the leather and subdivide it into tiny squares, which give to it the so-called diced effect. It is this process which gives rise to the question now before the court. The Government contends that this is virtually an embossing process which brings the merchandise within the classification of gauffre leather as the same appears in paragraph 451. This the importers deny.

In support of its contention the Government relies chiefly upon the decisions of this court in the case of *United States v. White* (2 Ct. Cust. Appls., 80; T. D. 31632), and the case of *Dejonge v. United States* (3 Ct. Cust. Appls., 463; T. D. 33040). A reading of those cases, however, discloses the fact that both decisions were rested upon the finding that the leathers therein involved were embossed leathers within the common acceptance of that term. The cases decided that leathers which were thus embossed came within the

statutory classification of *gauffre* leather. The following extracts from the decisions in question sustain the foregoing statement.

From the White case:

These definitions accord with those of the term "embossed," and it is admitted by all parties to the record that this merchandise, as imported, is embossed. It has in addition to embossing certain figures in jet or black. It appears, likewise, from the decisions quoted that the merchandise the subject of these decisions was embossed, although in addition thereto were figures in silver and other fancy effects. The essential, however, of *gauffre* leather, as defined by lexicographic authority, and giving those words their natural descriptive force, is leather which has been embossed.

From the Dejonge case:

In this connection it should be observed that the statement made in the White case, that the terms "*gauffre*" and "embossed" as applied to leathers are substantially synonymous, was not based upon any restricted or peculiar commercial signification of either of those words; to the contrary, both terms were used and intended in their ordinary signification. . Therefore, in the present case, the testimony produced by the importers in proof of a commercial meaning of the term "embossed" can have no application. In the White case it was conceded that the leather involved was embossed leather, and therefore the meaning of that term was not disputed and was not made the subject of commercial testimony. The decision in that case therefore implies that the word "embossed" is substantially synonymous in its ordinary signification with the word "*gauffre*" as used in the act. And in this connection it may safely be said that the leathers now before the court are embossed leathers within the common acceptation and descriptive force of that term. See *Stiner v. United States* (2 Ct. Cust. Appl., 347; T. D. 32079).

In the present case, however, it sufficiently appears that the leather in question is not embossed, according to the common understanding of that term. Nor is there any proof favoring a commercial designation of that character. The present merchandise has been subjected to the process of dicing alone, as the same is above described. That process, according to the common acceptation of the term, brings the affected leather within the description or classification of "*diced leather*," and not that of "*embossed leather*." The following definitions are given as authority for this statement:

Standard:

Dice, v. 2.—To ornament (leather) in squares or lozenges, by pressure with a tool or between dies.

Embossed, pa. 1.—Ornamented with or formed of bosses or raised figures; hence, richly decorated, as *embossed leather*.

Oxford:

Dice, v. 3.—To mark or ornament with a pattern of cubes or squares; to chequer.
* * * b. *Bookbinding*. To ornament (leather) with a pattern consisting of squares or diamonds.

Embossed, ppl. a. 1.—Carved or molded in relief; ornamented with figures in relief; (of figures or ornament) raised, standing out in relief.

It thus appears from standard authorities that, within common acceptation, leathers bearing upon their surface such traced lines as

those now in question constitute a separate class under the name of "diced leathers," whereas, within common acceptance, the term "embossed leathers" applies to a different class, namely, those which are ornamented with raised figures or figures in relief. Within the contemplation of these definitions the diced tracings upon the surface of leather are not equivalent to raised figures or figures in relief, but rather these are two separate kinds of ornamentation, and the leathers thus ornamented severally come within different descriptions or classifications. Nor is this a difference of terms only, for the diced effect upon the one class of leathers is substantially different from the embossed effect upon the other class, and it is produced by different means. It may, indeed, be claimed that the slightly depressed lines which are traced upon the surface of diced leather serve to bring the inclosed squares into relative prominence, and thus give them the appearance and effect of raised figures. This, however, in the case of the present merchandise is theoretical rather than actual, and it is hardly fitting that the assessment of the merchandise should depend upon so nominal a consideration, for in point of fact the present article does not present the appearance of raised figures or figures in relief upon its surface, nor has it been subjected to the processes commonly used for that result. The present merchandise, therefore, differs in character from that involved in the White and Dejonge cases, *supra*.

The court, therefore, holds that the merchandise at bar is not embossed or gauffre leather, and the decision of the board to that effect is *affirmed*.

UNITED STATES v. WALKER (No. 1317).¹

WATERPROOF CLOTH RESEMBLING VELVET.

The merchandise is not a velvet cloth, but a waterproof cloth resembling velvet on one side and a rubber-like fabric on the other. Cotton fiber is the component material of chief value. Paragraph 347, tariff act of 1909, applies.

United States Court of Customs Appeals, April 7, 1914.

APPEAL from Board of United States General Appraisers, Abstract 34149 (T. D. 33934).

[Affirmed.]

William L. Wemple, Assistant Attorney General (*Martin T. Baldwin*, special attorney, on the brief), for the United States.

Submitted on record by appellee.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

BARBER, Judge, delivered the opinion of the court:

The merchandise here is a waterproof cloth, and the question is under which of the two following paragraphs of the tariff act of 1909

¹ Reported in T. D. 34381 (26 Treas. Dec., 635).

duty ought to be assessed thereon. The relevant parts of these paragraphs are as follows:

325. * * * Velvets, * * * composed of cotton or other vegetable fiber, except flax, * * *.

347. * * * Waterproof cloth composed of cotton or other vegetable fiber, whether composed in part of india rubber or otherwise, * * *.

Duty was taken by the collector under paragraph 325, against which the importer protested, claiming under paragraph 347. The Board of General Appraisers sustained the protest. No evidence was introduced by the Government at the hearing before the board, and the importer contented himself by showing that the exhibit introduced in the case represented the importation and that it was waterproof. The fact that it was assessed as stated assumes that the merchandise is composed in part of a velvet made of cotton fiber. There was no direct evidence as to what was the component material of chief value. The Government here urges that the presumption arising from the collector's assessment, which is not met by any evidence, is that the cotton fiber is the component material of chief value, citing *United States v. Vandegrift* (4 Ct. Cust. Appls., 226; T. D. 33438) and *Kenyon v. United States* (4 Ct. Cust. Appls., 344; T. D. 33529).

We think the case may be disposed of upon the assumption that cotton is the component material of chief value.

From the importer's evidence and from the exhibit it appears that a substance resembling rubber has been applied to the back side of the fabric, which renders it impervious to water, i. e., waterproof. When it was applied the evidence does not disclose. As an entirety the article represented by the exhibit has on one side the appearance of velvet and on the other a smooth rubberlike appearance and feel. The waterproofing substance whenever applied was evidently in a liquid or semiliquid condition so that it penetrated the fabric, although it does not show on the reverse side.

In this court the importer submits on the record and the board's opinion, while the Government argues upon its brief. Its contention in substance is that the merchandise is dutiable under paragraph 325 because it is a velvet composed of cotton, and that therefore the provision for such velvets in that paragraph is more specific than the provision for waterproof cloth composed of cotton in paragraph 347.

We are satisfied that if the velvet was finished before the waterproofing substance was applied to the back side thereof, the fabric then was a velvet within the contemplation of paragraph 325. In its imported condition, however, it is a waterproofed velvet, and we do not think it can be said that within the meaning of the paragraph it is a *velvet*; it is something more and quite different. It is not conceivable that any person asking to be shown a cotton velvet would expect or be satisfied with the production of this article in response to the request. It is not that, but it is a waterproof cloth

resembling velvet on one side and a rubberlike fabric on the other. In other words, it has assumed a characteristic entirely foreign to that of velvet cloth.

It may be true, as argued by the Government, that the word "velvet" is a more narrow description than the term "cloth," because velvet is one of many kinds of cloth; it would perhaps also be narrower than the term "waterproof cloth," because that may mean many varieties of cloth made waterproof, but holding, as we do, that this article is no longer velvet, it is a cloth only, and having been so processed that it is waterproof, it is aptly designated as a "waterproof cloth."

In *United States v. Vandegrift*, *supra*, it was held that paragraph 347 should be construed as if it read "waterproof cloth composed of cotton or other vegetable fiber whether composed in part of india rubber or not." The merchandise there was similar to that involved in this case, except that the weft was of wool and the warp was of cotton, and it was held dutiable as a cloth made wholly or in part of wool under paragraph 378 of the tariff act of 1909, there being no testimony that cotton was of chief value.

In *Kenyon v. United States*, *supra*, a waterproof cloth composed of cotton and india rubber was held not dutiable under paragraph 347, because the rubber was the component material of chief value. In the case here the cotton fiber is the component material of chief value, while the rubberlike waterproofing substance applied thereto gives the article its distinctive name, renders possible its use as a protection from water or dampness, and is therefore an exact illustration of what is dutiable under paragraph 347.

The judgment of the Board of General Appraisers is *affirmed*.

UNITED STATES v. HAMBURGER LEVINE CO. (No. 1335).¹

1. "APPLIQUÉ," WHAT IS NOT.

The merchandise consists of cotton wearing apparel upon which are sewn stripes or bands of goods figured in different colors for ornamental purposes only. The articles are held to be cotton wearing apparel only, and not "appliquéd."

United States Court of Customs Appeals, April 7, 1914.

APPEAL from Board of United States General Appraisers, G. A. 7525 (T. D. 34087).

[Affirmed.]

William L. Wemple, Assistant Attorney General (*Martin T. Baldwin*, special attorney, of counsel; *Thomas J. Doherty*, special attorney, on the brief), for the United States.

Hatch & Chute (*Walter F. Welch* of counsel) for appellees.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MARTIN, Judge, delivered the opinion of the court:

The merchandise involved in this appeal consists of children's frocks and aprons made of a cotton fabric and ornamented with strips or bands of other cotton goods sewed upon their surface.

¹ Reported in T. D. 34382 (26 Treas. Dec., 637).

The appraiser reported the articles to be wearing apparel composed of cotton, appliqué. They were returned for duty at 60 per cent ad valorem under the provisions of paragraph 349 of the tariff act of 1909. Duty was assessed upon the merchandise in accordance with this return.

The importers thereupon filed their protest against the assessment, contending that the merchandise was not appliqué, and claiming an assessment of 50 per cent ad valorem upon the merchandise as cotton wearing apparel under paragraph 324, or alternatively at 45 per cent ad valorem under paragraph 332 as manufactures of cotton. The latter claim, however, is not insisted upon, the real question being whether the goods are dutiable simply as cotton wearing apparel or as cotton wearing apparel appliqué.

This issue was submitted upon evidence to the Board of General Appraisers and the protest was sustained, the board holding that the articles in question were cotton wearing apparel, but were not appliqué. From this decision the Government now appeals.

The following provisions of the tariff act of 1909 are controlling:

349. * * * Wearing apparel, handkerchiefs, and other articles or fabrics embroidered in any manner by hand or machinery, whether with a plain or fancy letter, initial, or monogram, or otherwise, or tamboured, appliqué, or scalloped, by hand or machinery, for any purpose, * * * all of the foregoing, composed wholly or in chief value of cotton, flax, or other vegetable fiber, * * * and not elsewhere specially provided for in this section, 60 per centum ad valorem: * * *.

324. Clothing, ready-made, and articles of wearing apparel of every description, composed of cotton or other vegetable fiber, or of which cotton or other vegetable fiber is the component material of chief value, made up or manufactured, wholly or in part, by the tailor, seamstress, or manufacturer, and not otherwise provided for in this section, 50 per centum ad valorem.

As appears from the foregoing statement, the present issue is one of fact only, and the single question in the case is whether the cotton wearing apparel at bar is or is not appliqué. Several witnesses were examined at the trial before the board, but their testimony did not purport to prove any peculiar commercial usage of the term "appliqué;" therefore the question must be answered according to the common or ordinary meaning of that term.

As already stated, the present merchandise consists of children's frocks and aprons made of cotton fabrics and ornamented with strips or bands of other cotton goods sewed smoothly onto their surface. These strips or bands are an inch or two in width; they are doubtless printed in numbers in the piece and are then cut apart and divided into suitable lengths for use. They have various designs or patterns printed in bright colors upon them, some being geometric or conventional in form, others being the figures of children at play. The strips or bands are sewed onto the garments in question along the upper and lower edges and also on the front. The pieces upon the front of the garments are either about the waist line in imitation of

belts or are about the neck having a yoke effect. They are designed solely for the ornamentation of the garments upon which they are sewn.

The question, therefore, is whether the printed strips or bands thus sewn upon such articles of wearing apparel make those articles appliquéd within the meaning of paragraph 349, above copied. It is contended by the importers that such ribbonlike strips or bands, even though bearing figures or designs, do not constitute appliquéd work, and that this term when used with reference to such ornamentation applies only to patterns or designs which are cut in shape or outline out of one fabric and thereafter sewed upon another.

In attempting to ascertain the meaning of the word "appliquéd," the following definitions from the authorities are important:

Oxford:

Appliqué, sb. Work applied to or laid on another material; *spec.* A trimming cut out in outline and laid on another surface. Also in metal work; and *fig.* Hence appliquéd.

International Encyclopædia:

Appliqué, a. Applied; laid on; said of ornaments cut from one fabric and transferred to another or to fabric of another color; as, lace *appliqué* upon a groundwork of other material.

Appliqué, n. Any ornament laid out and applied to another surface in cloth, wood, or metal; also, a piece of work or the kind of ornamentation thus produced.

Webster:

Appliqué. Having a pattern which has been cut out and transferred from another foundation, as a kind of lace.

Century:

Appliqué, a. 1. In modern dress and upholstery, applied or sewed on, or produced in this way. Thus, the gimp or pattern of soiled or injured lace may be sewed upon a new ground, or embroidered flowers may be secured to new silk; in such a case the pattern or ornament is said to be *appliqué*, and the whole is *appliqué* work.

2. More generally, said of one material, as metal, fixed upon another, in ornamental work; as, an enameled disk *appliqué* upon a surface of filigree, an ivory figure *appliqué* upon a Japanese lacquer, and the like. (In both senses also used as a noun.) *Point appliqué*, point lace in which the design, after having been separately made, has been applied to the net which forms the foundation.

Encyclopædia Britannica:

Needlework. * * * Appliqué or applied work belongs as much as patchwork to the mediæval category of *opus consutum*, or stitching stuffs together according to a decorative design, the greater part of which was cut out of material different in color, and generally in texture, from that of the ground to which it was applied and stitched. Irish art needlework, called Carrickmacross lace, is for the most part of cambric applied or appliquéd to net.

Manual of Needlework, teaching how to do Kensington, Appliqué, Cretonne, Roman, Cross-stitch, Outline, and other Embroideries. Mrs. Joseph L. Patten (New York, 1883). p. 18.

Cretonne embroidery. Is similar to appliquéd, only instead of cutting out designs of cloth or velvet, the designs are cut from cretonne and sateen such as is used for uphol-

steries. The pattern should be cut out with a fine pair of scissors; lay them face downward and paste carefully with very fine gum arabic or a little starch, then lay upon the fabric, where you have previously arranged to place them, and the gum or starch will keep them in place. Soft floss silk is the best for cretonne edges, and the work must be carefully done in close fine satin stitch, blending with color the silk and cretonne.

Encyclopædia of Needlework, by Therese de Dillemont. (English edition, 1890). p. 531.

Appliqué work (fig. 862).—Appliqué work means the laying on of pieces of one kind of stuff on to a foundation of a different kind, so as to form a pattern—these pieces of stuff of various shapes and sizes taking the place of solid needle-made embroidery. Appliqué work may be done on linen, silk, velvet, plush, and leather. The stuff out of which the pattern is cut has, in most cases, to be backed first with very fine tissue paper.

(Mem.: Fig. 862, first above referred to, is like an embroidered figure in outline.)

The Ladies Guide to Needlework, Embroidery, etc., by S. Annie Frost (Shields), 1877. c. III, p. 31.

Appliqué work.—The term appliqué, or application work, applies to the style of embroidery in which a pattern is cut or stamped out of one kind of material and transferred to another material, or the same in a different color, to which it is fastened by some edge of needlework, uniting by braid, satin stitch, cord, or beads.

In white goods this style of work is called transfer work, and will be found under that heading, the term appliqué being generally confined to articles of cloth, velvet, satin, or silk.

(Mem.: 6 designs illustrated all in outline work; 3 in white transfer, the same.)

Coles' Encyclopædia of Dry Goods (N. Y., 1900):

Appliqué.—In modern dress and upholstery this term signifies *applied* or *sewed on*. Thus, the gimp or pattern of soiled lace may be sewed upon a new ground, or embroidered flowers may be secured to new silk; in such cases the pattern or ornament is said to be *appliqué*, and the whole appliqué work. More generally said of one material fixed upon another in ornamental work. *Point appliqué* is a variety of needle-point lace, in which the design after having been separately made has been applied to the net which forms the foundation.

Stormonth:

Appliqué.—A style of work in which one material is laid upon another, as velvet on satin or cloth.

Standard:

Trimming.—Something added for ornament or to give a finished appearance or effect; that which embellishes or completes. (1) Material attached to a garment or the like for ornamentation.

Webster:

Trimming.—That which serves to trim, make right or fitting, adjust, ornament, and the like; especially, the necessary or the ornamental appendages, as of a garment.

Upon a comparison and consideration of the foregoing authorities the court is inclined to the view that they sustain the claim of the importers, and that the strips or bands in question are trimmings, but are not appliqué. It is true that in the case of several of the defini-

tions above copied the word "*appliqué*" is given a general meaning consistent with the claim of the Government, but in relation to the ornamentation of one fabric by means of figures or designs taken from another, the word is limited to such designs or patterns as are cut in outline from the other fabric and does not include ribbon-like strips of figured goods sewn in their entirety upon garments. The Oxford Dictionary, as above appears, defines *appliqué* as a trimming "*cut out in outline and laid on another surface.*" The International Encyclopædia calls it a pattern "*cut out from one foundation and applied to another.*" These definitions do not apply to solid strips of printed goods merely *cut off* from other fabrics, but to designs or figures which are themselves *cut out* from their containing fabric and thereby separated therefrom. The three books on needlework, from which quotations are given above, either directly or indirectly sustain this interpretation, and the illustrations contained in them are consistent with that understanding only. In the case of *Krusi v. United States* (1 Ct. Cust. Appls., 168) the *appliqué* work in question was described as follows: "A piece of cloth *cut to shape* from a cotton fabric in one case and a silk fabric in the other, with a small ornament in the center." In the case of *J. H. Thorp & Co.*, under the tariff act of 1897, decided by the board of General Appraisers in 1899 (T. D. 21375), the following definition of the term in question was given by Fischer, G. A.:

This merchandise corresponds with the definition given to the word "*appliqué*" by all the standard dictionaries and with the trade understanding. The general definition is: "Ornamentation with a pattern, which has been cut out of another color or stuff, applied or transferred to a foundation."

It seems clear indeed that the designs printed upon the strips before the court bear no relation whatever to the question whether the garments are *appliqué*, except in so far as they tend to prove that the strips themselves are designed for ornamental rather than utilitarian purposes. For if such printed strips would make these garments *appliqué*, there would be no good reason for denying the same classification to garments ornamented in the same manner with strips or bands in solid colors or even with strips of tape sewn on to the garments for ornamental purposes. This conclusion tends strongly against the validity of the Government's contention, for it may be stated with confidence that the work "*appliqué*," in common apprehension, does not apply to strips or bands of goods in solid colors or to lengths of tape sewed upon garments for ornamental purposes; these certainly would commonly be called trimmings only, and not *appliqué* trimmings. It is true, of course, that even such bands would be *applied* upon garments and therefore might literally be said to be *appliqué*, but this literal signification is much more comprehensive than the meaning attached to the term in common use.

Many of the cases cited in the briefs relate to ornaments such as cords, threads intertwined with gilt paper, or similar articles which, when sewed upon garments, do not form part of the surface of the garment itself, but stand out in relief therefrom. Others relate to patterns or figures superimposed upon a fabric by means of glue and flock or designs in metal. Such articles have been held in many cases to be appliqué; the present merchandise, however, differs in character from such articles.

The court therefore concludes that the present articles are not appliqué, but are cotton wearing apparel only, dutiable at 50 per cent ad valorem under paragraph 324, and the board's decision to that effect is *affirmed*.

KRONFELD, SAUNDERS & Co. *et al.* v. UNITED STATES (No. 1246).¹

GILDED WOODEN FRAMES AND PAINTINGS.

Where paintings have been admitted free of duty, the frames on these, when framed, have, by a long course of practice in the customs, recognized in law, been dutiable; and where paintings are dutiable and are imported in frames, these frames are not integral parts of the pictures and can not be deemed containers, either in themselves or by the rule *ejusdem generis*. The pictures and the frames are separable for tariff purposes.—United States v. Hensel (98 Fed., 418).

United States Court of Customs Appeals, April 14, 1914.

APPEAL from Board of United States General Appraisers, Abstract 33227 (T. D. 33668).

[Affirmed.]

Walden & Webster for appellants.

William L. Wemple, Assistant Attorney General (Charles E. McNabb, assistant attorney, of counsel; Frank L. Lawrence, special attorney, on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

The importations involved in this case consist of paintings in ordinary gilded wooden frames. Some of the paintings were assessed at 15 per cent ad valorem under paragraph 470 of the act of 1909 and the others were passed free of duty under paragraph 717, but in both instances the frames were separately assessed by the collector at 35 per cent ad valorem as manufactures of wood under paragraph 215. The appellant contends that where the paintings are dutiable the frames are dutiable at the same rate as part of the value of the paintings, and that where paintings are free the frames are also free. The board overruled the protest based upon these claims, and the importer appeals.

Treating first of such frames as were imported with the paintings admitted free of duty: The practice of the department, covering a long period of time, has been uniform and unvarying so far as we can dis-

¹ Reported in T. D. 34399 (26 Treas. Dec., 672).

cover. As early as 1866, under a provision of the act of July 22, 1862, admitting free of duty paintings the product of American artists residing abroad, the claim was made that the frames accompanying such paintings were likewise free. The Secretary of the Treasury ruled as follows:

Under this provision of the statute I find no sanction for the free admission of picture frames, although the same may form an integral part of the picture.

In 1877 (T. D. 3333) the department held that glazed frames inclosing antiques were dutiable, although the antiques were free.

In 1882 (T. D. 5303) it was held that frames of plaster casts were dutiable as manufactures of wood, although the casts were free because imported for educational purposes.

In 1887 (T. D. 8277) a plush-covered wooden frame was held classifiable as a manufacture of silk, separately from a bas-relief to which the frame belonged and with which it was imported, although the bas-relief was presumably free, being the work of an American artist.

Again in 1887 (T. D. 8006) it was said, referring to the previously quoted decision in 1866:

I have to inform you that the department's decisions of January 22, 1866, * * * which held in effect that frames subject to classification independently of the paintings to which they pertain is still in force and has been confirmed by various subsequent decisions.

And it was stated that the fact that frames were not separately specified in invoices does not affect their classification, but in such cases their value should be separated by the appraisers and the duty levied thereon according to the materials of which they may be composed.

In *Hensel v. United States* (99 Fed., 722) it was said:

Counsel for the Government shows by the citation of a great number of Treasury decisions since 1875 that duty has been repeatedly assessed on frames as manufactures of wood, where the paintings, for certain reasons, have been admitted free.

And the opinion concludes:

I think the general provisions of the act of 1894 for free entry of paintings which are works of art should not be so construed as to include ornamental frames such as those here in question.

It was further said in the case that these frames were designed for other purposes than to cover and protect the paintings and that they were designed to give additional attractiveness to the pictures.

Since the promulgation of this decision the substance of the provision for free entry of paintings has been reenacted, and the presumption is that the construction thus placed upon the law by the Treasury Department and by the court was adopted therewith. We conclude, therefore, that as to frames accompanying paintings

entitled to free entry the rule should be considered as settled, unless the contention of the importer that such frames are to be treated as containers within the rule laid down in *United States v. Leggett* (66 Fed., 300) is allowed. This question will be considered in connection with that relating to the duty goods.

As to the question of the frames accompanying dutiable pictures, the claims of the appellants are that the frames are either containers or cost charges and expenses. The evidence as to these frames is that offered by the importer, who called two witnesses. The substance of the testimony of the first witness is that it was customary to import paintings in the same condition as these in question with the frames on them—that is, paintings in frames; that they are not always so imported, but sometimes are unframed; and that the frames in question were the usual style of frames in which pictures are hung upon the wall.

The testimony of the other witness was substantially to the same effect, with the addition that when pictures are sold thus imported they were contained in frames, and in describing these frames he stated that they were gilded frames, and in answer to the question, "And they are designed for exhibition purposes with the picture, and not designed to protect the picture in transportation?" he replied, "Not for protection."

We think the board rightly held that these frames are not containers within the meaning of subsection 18 of section 28 of the tariff act of 1909, nor within the meaning of the term "containers" as used in connection with free-entry goods. While it may be difficult to define with exactitude the scope of the word "containers," the term should be limited in its application to articles which are designed and essential for the purpose of holding the article for importation or shipment. It is apparent that the frame of a picture bears no such relation to the picture itself. Either may be separately imported and often are.

The precise question was discussed by the Circuit Court of Appeals in *United States v. Hensel* (98 Fed., 418), in which case the court said:

The importers contend that a duty of 20 per cent ad valorem should be assessed on the framed paintings as an entirety—painting and frame together—or under section 19 of the act of June 10, 1890, on the theory that the frame is a case or covering of the painting, and to be reckoned as a part of the dutiable value of the painting. This last proposition commended itself to the Circuit Court. The section last cited provides, *inter alia*, that "If there be used for covering or holding imported merchandise * * * any unusual article, or form designed for use otherwise than in the bona fide transportation of such merchandise to the United States, additional duty shall be levied * * * upon such article at the rate to which the same would be subject if separately imported." Manifestly, these frames were designed for use otherwise than in the transportation of the pictures to the United States. They are ornamental, and are designed rather to add to the attractiveness of the pictures when exhibited

than to protect them against the risk of transport. It will not be necessary, however, to review the decisions bearing on this question of coverings, since *Oberteuffer v. Robertson* (116 U. S., 499, 6 Sup. Ct. 462; 29 L. Ed., 706), where the act of 1883, which imposed what was practically a penalty of 100 per cent, was construed; nor to discuss the argument advanced by appellee that, within the common or ordinary meaning of the word, a "painting" includes the frame in which it is bought, sold, transported, imported, and exhibited. It was held in *Robertson v. Downing* (127 U. S., 613, 8 Sup. Ct., 1330; 32 L. Ed., 271) that, "when there has been a long acquiescence in a regulation, and by it rights of parties for many years have been determined and adjusted, it is not to be disregarded without the most cogent and persuasive reasons." It appears that the Treasury Department has allowed frames containing pictures, which for some reason had been given free entry by Congress, to come in free with the pictures; but in the case of dutiable oil paintings the practice of assessing a separate and independent duty upon the frames has been followed by the Treasury Department continuously since 1866, and, so far as appears, has never been successfully attacked; nor, indeed, has it ever been presented to any court. We therefore conclude that the decision of the Circuit Court should be reversed, and the classification of the frames for duty purposes as manufactures of wood should be sustained.

The statement that the Treasury Department had been accustomed to allow frames containing pictures which had been given free entry to come in free with the pictures is shown to have been a misapprehension by the court. See *Hensel v. United States* (99 Fed., 722).

We think the reasoning of the court in the case quoted above is sound. It is urged, however, that a broader scope should be given to the word "containers," for the reason that the provision of the administrative act of 1890 was subject to the rule of *ejusdem generis*—see *United States v. Peabody* (3 Ct. Cust. Appls., 130; T. D. 32383)—but that since the enactment of subsection 18 of section 28 of the act of 1909 the provision has been broadened to include bottles, jars, and other containers. So, it is claimed, the rule of *ejusdem generis* has no application.

The decision referred to does not appear to rest upon the rule of *ejusdem generis*, but, as is well urged in the Government's brief, the purpose of the amendment in 1909 was to enlarge the law so as to include containers of nonsolids, the new language of the section being "casks, barrels, hogsheads, bottles, jars, demijohns, carboys, and other containers * * * whether holding liquids or solids." If the rule of *ejusdem generis* applied to the former condition it would equally apply under the amended statute, and the amended provisions are not such as to extend the scope or meaning of the paragraph so as to include such an article as frames of pictures.

Nor do we think the cost of the frame can be treated as "costs, charges, and expenses incident to placing the merchandise in condition packed ready for shipment to the United States." As before pointed out, the picture itself and the frame might be separately imported. The placing of the picture in the frame is not essential

to its packing, and, as testified to by the importer's witness, was not designed for protection.

The claim that these framed pictures are integral articles and can not be separated for the assessment of duty is answered by the fact that the frame and the picture may be sold separately—the picture may be sold without the frame—and if by adapting it to a particular picture it becomes an integral part of the article, it is still separable for tariff purposes. See *United States v. Waterhouse* (1 Ct. Cust. Appls., 353; T. D. 31452) and cases cited and *United States v. Ranlett* (172 U. S., 133).

The decision of the board is *affirmed*.

UNITED STATES *v.* BADISCHE Co. *et al.* (No. 1301).¹

COAL-TAR COLORS AND DYES—WHAT NOT.

The merchandise consists of preparations of coal tar known as bases. These bases, after acid treatment, are used in dyeing fabrics. The proof does not show there is a commercial designation of these goods as coal-tar colors and dyes, and as brought in they are not coal-tar colors and dyes, but a product or preparation of coal tar, not medicinal, and were dutiable as such under paragraph 15, tariff act of 1909.

United States Court of Customs Appeals, April 14, 1914.

APPEAL from Board of United States General Appraisers, G. A. 7505 (T. D. 33831).

[Affirmed.]

William L. Wemple, Assistant Attorney General (*Leland N. Wood*, special attorney, of counsel), for the United States.

Walden & Webster for appellees.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

SMITH, Judge, delivered the opinion of the court:

This case involves the classification for tariff purposes of certain coal-tar products, which were assessed for duty by the collector of customs at the port of New York as coal-tar colors at 30 per cent ad valorem under that part of paragraph 15 of the tariff act of 1909 which reads as follows:

15. Coal-tar dyes or colors, not specially provided for in this section, thirty per centum ad valorem; * * *.

The importers protested that the goods were not coal-tar dyes or colors, but nonmedicinal preparations of coal tar not specially provided for and dutiable at 20 per cent ad valorem under that part of said paragraph 15 which reads as follows:

15. * * * All other products or preparations of coal tar, not colors or dyes and not medicinal, not specially provided for in this section, twenty per centum ad valorem.

¹ Reported in T. D. 34400 (26 Treas. Dec., 676).

The Board of General Appraisers sustained the protest and the Government appealed.

It appears from the record that the several articles which were subjected to duty by the collector as coal-tar colors are known as Victoria blue B base, Victoria green base, auramine base, crystal violet base, vesuvin B base, vesuvin 000 extra base, methyl violet base, rhodamine base, and chrysoidine base. The uncontradicted testimony of the importers discloses that these commodities are used for the manufacture of the colors indicated by their names and that they are denominated bases for the reason that they must be first chemically combined with an acid in order to produce a dye or coloring material. The designation of the bases as blue, green, violet, or brown does not at all indicate that they are of the color designated or that they are capable of imparting it, but that the base will produce the designated color when submitted to appropriate treatment and processing. The evidence is undisputed that the substances in controversy of themselves have no tinctorial properties and that until the bases are converted into salts by chemically combining them with some suitable acid none of them can be used as a dye or color. In order that any of the coal-tar color bases in question may be given the character of a color and made effective as a coloring agent it must be first converted into a salt by chemically combining it with oleic or some other organic acid adapted to the purpose. That means, of course, the creation of a chemical compound, a new article, endowed with properties distinctly different from those possessed by either base or acid prior to their chemical union. From all this it is apparent that the color bases involved in the protests under consideration are not themselves dyes or colors, as those terms are commonly understood, but substances from which such colors and dyes are made. In other words, that which may be properly called a color is the salt and not the coal-tar base from which the salt was produced.

The appellant contends, however, that the expression "coal-tar dyes or colors" is a tariff designation to which the trade of the country has given a meaning different from that popularly assigned to it and broad enough to cover the goods in question. In support of this contention the Government on the hearing before the board produced the testimony of several witnesses, who testified in effect that they were engaged in the business of buying and selling at wholesale coal-tar bases and that merchandise of that character was included by the trade in the category of coal-tar dyes or colors. These same witnesses made it clear, however, that the several articles imported were ordered, bought, and sold under their distinctive names, and we are decidedly at a loss to understand just how wholesale dealers managed to give to the expression "coal-tar dyes or colors" a meaning differ-

ent from its common signification and just how those who testified on the subject acquired the knowledge that such a meaning had been conferred. Possibly there were usages of the trade other than the ordering, buying, and selling of goods which enlarged the signification of the term "coal-tar dyes or colors" so as to include materials for the manufacture of colors and dyes, but if so no such usages were pointed out by any of the witnesses. The evidence of the Government as to commercial meaning was confined to the bare assertion that trade and commerce included within the tariff designation under discussion merchandise which would be excluded by the common meaning of such designation. Such evidence is but little better than the statement of a mere conclusion, and is not very convincing unsupported by any fact which would justify it or by any proof whatever that the designation was actually used in the trade. Moreover, some of the witnesses were unable to give any information as to what signification was attached by the trade to "coal-tar dyes or colors," and those who did attempt to define it were not entirely in accord. One of the witnesses, Paul R. McKinney, testified that the meaning of the designation in the trade did not differ from its common everyday meaning. He also said that the designation was broadening all the time in the trade, from which it would seem that the trade understanding was not definite, and therefore lacking in one of the essentials necessary to constitute commercial designation.

Eugene A. Widmann stated that in the trade "coal-tar dyes or colors" meant coloring matters "soluble, primarily, in water or alcohol or oils, in acids."

W. J. Robertson said that, commercially speaking, coal-tar dyes or colors were dyes, from which it would appear that in the trade colors and dyes meant the same thing, and were consequently synonymous terms.

Ernest C. Klipstein declared, on the other hand, that a dye, as understood by the trade, was a coloring matter soluble in water, and that a color was a coloring matter not soluble in water.

Now, strictly speaking, that which is soluble is that which is capable of being reduced to a liquid state by the disintegrating action of a fluid without chemical change or reaction. See "Solution" (Century Dictionary). It may be properly said of salt and sugar that they are soluble in water, inasmuch as neither salt nor sugar apparently suffers any chemical change by being so dissolved, and both may be recovered by evaporating the water which seemingly holds them in suspension. The same may not be said of other solids, however, which by the chemical action of an acid produce a liquid from which neither of the materials out of which it was made can be secured by purely mechanical processes.

According to the clear preponderance of evidence in this case, the coal-tar bases here involved, when subjected to the action of the organic acid which made them commercially useful, underwent a chemical change which created out of oil and base a new chemical body endowed with coloring properties possessed by neither of the raw materials. The bases were therefore not held in solution and were therefore not within the trade meaning of "coal-tar dyes or colors" as defined by Widmann and Klipstein, giving to the word "soluble" its true meaning. Possibly both witnesses used the term "soluble" without much thought of its real signification, but if so, we are left to surmise what they really meant, and that does not make their definition any more acceptable. Taking into consideration all the evidence brought forward by the Government, we can not say that the board was not warranted in finding that there was a failure to prove that the tariff designation in issue had a definite, uniform, and general trade signification different from that which it commonly bore.

We are of opinion, therefore, that the decision of the Board of General Appraisers was correct, and, accordingly, it is *affirmed*.

ISLER & GUYE *et al.* *v.* UNITED STATES (No. 1315).¹

BRAIDS RESEMBLING COTTON NOT PYROXYLIN ARTICLES.

The imitation horsehair braids of the importation were not shown to resemble pyroxylin or its compounds, or any article of which pyroxylin is the component material of chief value. On the contrary, in texture, quality, and use they resemble braids of cotton, and since they were dutiable by similitude, they were dutiable as cotton braids.

United States Court of Customs Appeals, April 14, 1914.

APPEAL from Board of United States General Appraisers, Abstract 34047 (T. D. 33872).

[Affirmed.]

Walden & Webster for appellants.

William L. Wemple, Assistant Attorney General (*Leland N. Wood*, special attorney, of counsel; *Martin T. Baldwin*, special attorney, on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

BARBER, Judge, delivered the opinion of the court:

The several appeals in this case relate to artificial or imitation horsehair braids used in the manufacture of hats. The importations were made while the tariff act of 1897 was in force and the question therefore is the proper classification of the goods under the provisions of that act. Assessment was made by the collector at the rate of 60 per cent ad valorem by similitude to silk braids under paragraph

¹ Reported in T. D. 34401 (26 Treas. Dec., 679).

390 of section 1 by force of the provisions of section 7 of the act, known as the similitude provision. The importers protested. The Board of General Appraisers, upon hearing, found the braids in respect to material, quality, texture, and use to more resemble cotton braids than articles made of pyroxylin, and therefore held them dutiable by similitude to cotton braids under paragraph 339 of section 1 by virtue of said section 7, from which judgment the importers alone appeal to this court.

The protests assert and here the importers rely upon the claim that these braids, instead of being dutiable as assessed by the collector or as held by the board, were dutiable by similitude under the provisions of paragraph 17 of section 1 in connection with said section 7 as articles of which pyroxylin is the component material of chief value. It is not claimed on the part of the Government that the collector's assessment was correct, but it urges here that the board reached the right conclusion and that its judgment should be affirmed.

In *Thomass v. United States* (1 Ct. Cust. Appls., 86; T. D. 31107) we considered the classification of gloves under the act of 1897 made of so-called artificial silk, which it was agreed was yarn composed of threads or filaments manufactured from cellulose obtained from cotton waste, and held that such gloves were dutiable by similitude under paragraph 314 as wearing apparel in chief value of cotton or other vegetable fiber rather than by similitude as articles of wearing apparel made of silk or of which silk was the component material of chief value under paragraph 390 of the same act.

In *United States v. Cochran* (3 Ct. Cust. Appls., 57; T. D. 32349) we held that untrimmed hats made of braids composed of strands of imitation horsehair were, by similitude, dutiable as cotton wearing apparel under paragraph 314 of the act of 1897 rather than by similitude as untrimmed ladies' hats of straw under paragraph 490 of the same act.

In *Plummer v. United States* (3 Ct. Cust. Appls., 229; T. D. 32539) artificial horsehair hat braids made of threads or filaments substantially of cellulose were, by similitude, held dutiable as braids composed wholly or in chief value of cotton or other vegetable fiber under paragraph 339 rather than by similitude under paragraph 409 of the act of 1897 providing for braids composed wholly of straw, chip, grass, etc.

In *United States v. Eckstein* (222 U. S., 130) the Supreme Court held that artificial or imitation horsehair in the shape of skeins or spools of yarn manufactured therefrom was dutiable by similitude as cotton yarn under paragraph 302, rather than as silk yarn under paragraph 385 of the act of 1897. It there appeared that the yarn was made of artificial threads or filaments of cellulose produced from cotton waste.

It will be observed that in the act of 1897 there was no express provision for artificial horsehair, and hence the doctrine of similitude was invoked in all the cases cited.

Cognizance is had by the importers' counsel of these decisions, and the correctness of the conclusions reached therein is not controverted upon the issues there presented, but, it is said, and such appears to be the fact, that in none of those cases was the issue raised as to the applicability of paragraph 17 in connection with section 7 of the act, and hence that the precise question now before us has never been before litigated or determined. This new issue, stated in the language of importers' counsel, is "whether the merchandise is more similar to pyroxylin braids than cotton braids." It is not, however, claimed, if this issue be decided adversely to the importers' contention, that there was error in the judgment below.

Paragraph 17 relates to collodion and all compounds of pyroxylin and articles of which either is the component material of chief value.

There is no question of commercial designation in the case, and the word "pyroxylin" must therefore be given its common meaning.

In the substance of the language of the Standard Dictionary pyroxylin is an explosive compound, prepared by steeping cellulose in a cold mixture of certain acids and afterwards washing it. Guncotton is also said to be a synonym for pyroxylin.

The importers' chemical expert, Dr. Berry, who testified in the case before the board and who was the only chemical expert called as a witness, said that pyroxylin was a low form of nitrocellulose, soluble in ether-alcohol; that it contained no cellulose as such, but was nitrocellulose, a different chemical compound than cellulose and having a different formula; that it had different physical characteristics than cellulose in that, among other things, it was inflammable, would be explosive under pressure, and was a low form of guncotton, from which it differed in being less highly nitrated.

Cellulose is a product of cotton, straw, or other vegetable fiber, of which it is an essential constituent, especially of cotton, which is said to be composed of about 90 per cent cellulose. It is obtained by chemically treating the plant growth in which it is found, thereby breaking down the natural structure or fiber and enabling the cellulose content to be segregated.

Dr. Berry, whose testimony is not controverted in any way, also testified that these braids are of two kinds, denominated by him as nonnitrated and denitrated; that the threads of which they are composed were both made from purified cellulose; that cellulose is obtained from cotton, straw, or any vegetable cellulose fiber; that the purified cellulose is brought into solution and squirted through a very small orifice into a solution which solidifies it, producing

the nonnitrated threads (what chemicals are used in dissolving the cellulose or in making the solution which solidifies these threads he did not state); that in producing the denitrated threads the purified cellulose is treated with nitric and sulphuric acids, forming a low-nitro compound; that this is dissolved in a suitable solvent, such as ether-alcohol, and then squirted in the same manner through an orifice into a solution which solidifies it; that this product is treated with other suitable chemicals which denitrates it, *i. e.*, causes it to revert back to cellulose; that the final products in both cases—that is, both the nonnitrated and denitrated threads—are over 99 per cent pure cellulose, practically identical, except in the appearance under the microscope, and identical in chemical constituents; that the denitrated threads are pyroxylin compounds before the last process—that is, the denitrating; that cotton is “almost altogether cellulose”; that pyroxylin can not be made without the use of cellulose; that collodion is pyroxylin in solution.

While the doctor did not specially so state, we assume from his evidence that the above processes are substantially continuous, and they appear to be very like if not identical with those mentioned by Dr. Joseph Bersch in his work “Cellulose, Cellulose Products, and Artificial Rubber,” wherein the author describes the manufacture of artificial threads from cellulose and collodion, both of which are referred to as artificial silk, one of the processes employed in making these from collodion being known as Chardonnet’s method, which is mentioned by the Supreme Court in the Eckstein case, *supra*.

Dr. Bersch also there states that threads manufactured from collodion would be of no practical use because a fabric made therefrom would in an infinitely short time be reduced to ashes by a spark falling upon it and that, therefore, they are denitrated, *i. e.*, reconverted into cellulose. The manner of such denitration as described by Dr. Berry appears to be substantially like that mentioned by Dr. Bersch, although much more fully detailed by the latter.

Restating the facts, without special regard to the various chemical processes employed in producing either class of these threads, it is apparent that cellulose is obtained by destroying the fiber of the cotton or other plant and segregating its cellulose content; that this cellulose is then purified and by various processes, mostly chemical, made into artificial threads, which are practically pure cellulose, in the making of which two methods are shown to have been employed, one involving more chemical processes than the other, perhaps common so far as the shorter method goes, but the result in each case is the same, namely, cellulose threads resembling those made of natural cotton fiber and as to material substantially identical therewith, in that all have cellulose as their principal component

material. These cellulose threads are then made into imitation horse-hair braids, in which condition they are imported. Pyroxylin is made from cellulose, but the chemical processes employed are more extended than those employed in making the nonnitrated and less extended than those employed in making the denitrated threads here, and there is nothing in the record which tends to show, nor is it claimed by importers' counsel, that in fact there are any braids or other articles composed of pyroxylin that are at all similar in quality, texture, or use to the braids which are the subject of these appeals.

Section 7 provides that—

Each and every imported article, not enumerated in this act, which is similar, either in material, quality, texture, or use to which it may be applied to any article enumerated in this act as chargeable with duty, shall pay the same rate of duty which is levied on the enumerated article which it most resembles in any of the particulars before mentioned.

At the outset it may be observed that *identity* of material precludes the applicability of the similitude provision, *i. e.*, as applied to the braids here if composed of pyroxylin, they would be directly dutiable under paragraph 17.

It has been frequently held and is admitted by the importers that similitude is a question of fact, the existence of which must be proven unless conceded. Here the similitude claimed by importers is not conceded, and, therefore, it is incumbent upon them to show that these hat braids more resemble pyroxylin, or some article of which it is the component material of chief value enumerated in the act, than they resemble braids made of cotton, as held by the board.

The importers' argument in substance is that, although these braids are actually neither cotton nor pyroxylin, they are much nearer to pyroxylin than cotton because cellulose is the immediate material of pyroxylin and of the nonnitrated braids, and that the denitrated braids more resemble pyroxylin because they are produced by a part of the same processes which yield pyroxylin, and have, in an intermediate chemical process, once assumed the form of pyroxylin or a compound thereof.

The relevant part of this contention, it will be observed, is founded upon similarity of *material* only. But in the *finished* state of these braids there is no substantial similarity of material to anything made of pyroxylin because there is no substantial similarity between cellulose and pyroxylin as materials. They are altogether different in physical characteristics and chemically they have no resemblance. The fact that pyroxylin can not be made without cellulose or that it is obtained therefrom by the same or similar processes as are the braids here does not change this conclusion, because it is the *result* and not the *means* which is important. The raw material for the threads *was* cellulose; the threads when finished *are* cellulose.

The manufacture of artificial threads from cellulose is undertaken not with the purpose of producing pyroxylin, but rather to obtain a thread resembling the natural fiber of cotton and which can be devoted to some of its many uses. This result has been achieved and a thread produced, the principal component material of which, like that of cotton, is cellulose. The fact that in the chemical processes employed pyroxylin or a compound thereof appears does not affect the question of similitude, because that condition disappears before the threads are finished.

We think, in respect of material, these hat braids more resemble braids of cotton than they resemble pyroxylin or braids of pyroxylin, if any there are, or any other article of pyroxylin shown to exist or of which we have knowledge.

In this connection it is proper to repeat that there is no evidence that there are pyroxylin braids, neither is there any evidence that there is any article made from pyroxylin which at all resembles either in quality, texture, or use the braids which are the subject of these appeals.

It has been held that the similitude of use contemplated by section 7 is a substantial similitude between the article for which it is claimed and one enumerated in the statute; that is, a similarity in its employment or its effect in producing results. *Sykes v. Magone* (38 Fed., 494), *Murphy v. Arnson* (96 U. S., 131), *Weilbacher v. Merritt* (37 Fed., 85), *Rich v. United States* (172 Fed., 293).

The application of this rule makes strongly against the importers, because they have failed to show that these braids, or the threads of which they are composed, either in employment or in effect in producing results, resemble pyroxylin or its compounds or any article of which either is the component material of chief value or have any adaptability in use as a substitute therefor. We are clear that similarity in respect of use to pyroxylin or its compounds is not shown.

As to similarity in use or as to similarity in quality and texture between these braids and braids composed of cotton, it is unnecessary to make extended discussion, because the similarity relied upon by importers does not relate to these three characteristics, and also because the cases first referred to in this opinion are sufficient authority for saying that, respecting texture, quality, and use, these braids composed of artificial horsehair closely resemble braids of cotton.

We find no error in the judgment of the Board of General Appraisers and it is *affirmed*.

UNITED STATES *v.* SPANISH RIVER PULP & PAPER MILLS (LTD.)
(No. 1260).¹

WOOD PULP MANUFACTURED UNDER A SPECIAL AGREEMENT WITH THE PROVINCE OF ONTARIO.

The question for determination is whether the written contracts between the appellee here and the Province of Ontario, Canada, impose any restrictions upon appellee's right to export wood pulp manufactured from pulp wood cut upon Crown lands. *Held*, that the contracts impose certain conditions, some new, some old, to be complied with by the appellee as a continuing consideration for the abrogation of the preexisting contractual prohibition of export of such pulp wood and the enjoyment of the grant of the right to export the same; that these conditions, whether precedent or subsequent, impose burdens upon and result in a restriction of the export of the pulp wood from which the importations were manufactured; and therefore that free entry can not be had under the provisions of section 2 of an act of Congress entitled "An act to promote reciprocal trade relations with the Dominion of Canada, and for other purposes," approved July 26, 1911.

United States Court of Customs Appeals, April 28, 1914.

APPEAL from Board of United States General Appraisers, G. A. 7490 (T. D. 33707).

[Reversed.]

William L. Wemple, Assistant Attorney General, for the United States.
Comstock & Washburn for appellees.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

BARBER, Judge, delivered the opinion of the court:

The briefs state and the arguments proceed upon the theory that the sole question here is whether ground wood pulp manufactured in the Province of Ontario, Canada, from pulp wood cut on Crown lands in that province and imported after November 25, 1912, is dutiable, as assessed, under paragraph 406 of the tariff act of August 5, 1909, or is entitled to free entry under section 2 of the act of Congress of July 26, 1911, as claimed by the importer.

The Board of General Appraisers heard the case July 1, 1913, and by decision dated August 18, 1913, sustained the importer's claim.

If not entitled to free entry we do not understand that the assessments are challenged.

The relevant facts appear of record as follows: The importers, the Spanish River Pulp & Paper Mills (Ltd.), was on November 25, 1912, and for some time prior thereto had been, the assignee and owner of certain concessions from the Province of Ontario as grantor, set forth in duly executed written contracts in which the minister of Crown lands for that province acted for it and to which contracts the assignors of the importer or their predecessors were the other contracting parties.

These contracts were in effect grants of the privilege to cut pulp wood and other wood on certain tracts of land, one of 75 square miles

¹ Reported in T. D. 34426 (26 Treas. Dec., 724).

in the district of Nipissing and the other of at least 50 square miles in the district of Algoma in said province. The time limit of the grants was 21 years from their respective dates or from the dates of certain renewals or modifications thereof, unnecessary to mention. A stipulated price for the timber to be cut thereunder was mentioned in the contracts, and each contained a provision that no wood of any kind should be cut on the lands covered thereby for the purpose of export or for sale for that purpose. The contracts were in force at the time the importations under consideration were made, except as modified by the contract hereinafter set forth.

On the said 25th day of November, 1912, another contract was duly made and executed between the Province of Ontario, represented by its said minister of Crown lands, and the importer here of the following tenor:

Whereas the company is now the owner of a certain concession granted by the Government on the 21st day of September, 1899, to Marshall Jewel Dodge and others and another concession granted by the Government to the Sturgeon Falls Pulp Co., Limited, on the 6th day of October, 1898, subject to the terms and conditions of the respective agreements granting the said concessions and divers agreements from time to time entered into between the Government and the several companies in whom the same were from time to time vested;

And whereas it is provided in the agreements granting the said concessions that the grantees thereof shall not be entitled to cut wood for purposes of export in the wood nor for sale to other persons for export in the wood;

And whereas it is provided in the said agreement of the 21st day of September, 1899, between the Government and the said Marshall Jewel Dodge and others that the company should with all convenient dispatch proceed with the construction of a pulp mill and a paper mill and should thoroughly equip the same so that the expenditure of the company in the construction of the said pulp mill and paper mill and in such other buildings and constructions as should be necessary to the undertaking would be at least the sum of five hundred thousand dollars, and that the company should operate the same so that the annual output of the said mills in pulp and paper should amount to at least twenty thousand tons, and so that at least two hundred and fifty hands on an average should be continuously employed in connection therewith;

And whereas under the conditions governing the concessions granted by the Government by the said agreement of the 6th day of October, 1898, to the Sturgeon Falls Pulp Co., Limited, the company became bound to construct a paper mill at or near Sturgeon Falls and to thoroughly equip the same so that the expenditure in the construction and equipment thereof should be at least one million dollars, and the company is bound to operate the plant so that at least fifteen thousand tons of paper will be manufactured annually, commencing from the 13th day of September, 1912, and so that at least one hundred and fifty hands on an average will be continuously employed in connection therewith;

And whereas the company has now erected at Espanola and Sturgeon Falls large pulp mills and paper mills and plant upon which there has been expended upwards of three million dollars, and the company is now operating the same and is employing in connection therewith a much larger number of hands than prescribed by the said obligations aforesaid;

And whereas the company proposes to extend and enlarge its plant at Espanola aforesaid by the erection and equipment of two additional paper machines and to

expend in connection therewith approximately an additional sum of five hundred thousand dollars;

And whereas the company has applied to the Government to be relieved from the restriction against the export of wood before mentioned and the Government has agreed to grant such relief, subject, nevertheless, to the terms hereinafter contained:

Now therefore it is agreed:

1. The company shall, prior to the first day of July, 1913, erect and equip at Espanola aforesaid two additional machines and shall, from and after the said date, continuously operate the same.

2. The company shall, from and after the said first day of July, so operate its pulp and paper mills at Espanola and Sturgeon Falls aforesaid that the annual output of the said mills in pulp and paper will amount to at least fifty thousand tons and so that at least five hundred hands on an average will be continuously employed in connection therewith.

3. The company shall in every year during the season of operations employ at least one thousand hands in the woods cutting wood for the purpose of the operations of the said mills and plant.

4. In consideration of the foregoing the company, its successors and assigns, shall, notwithstanding anything contained in the grants of the said concessions or either of them or in any of the agreements in amendment or extension thereof, be entitled to cut and remove the wood suitable for the manufacture of pulp, authorized to be cut under said agreements, from the lands comprised in the said concessions and each of them (subject to the payment of the dues as provided in the said agreements), not only for the manufacture of pulp and paper in the pulp and paper mills of the company, but also for the purposes of export in the wood or for sale to other persons for export in the wood and all prohibitions and restrictions contained in the grants of the said concessions or in any of the agreements in amendment or extension thereof relating to the export of wood are hereby rescinded and the company, its successors and assigns, shall be and is hereby relieved and discharged therefrom, and the agreements granting the said concessions shall be read as if the said prohibitions and restrictions had not been contained therein.

5. Nothing herein contained shall in any way abridge or curtail any of the covenants, conditions, or obligations contained in the grants of the said concessions or either of them or in any of the agreements in amendment or extension thereof, and all of said covenants, conditions, and obligations shall be and remain in full force, except as hereby amended.

6. In the event of the company, its successors or assigns, failing at any time to perform any of its obligations herein contained or failing to comply with any of the covenants, conditions, or obligations of the company contained in the said agreements granting the said concessions as amended hereby and by the said subsequent agreements then the Government may without any notice revoke the right, license, or permit to cut wood upon the lands comprised in the said concessions and each or either of them or may, by order in council, impose upon the company, its successors or assigns, such regulations or conditions as may more fully and effectually secure to the Government the complete performance of the said covenants, conditions, and obligations and every of them: *Provided, further*, That the lieutenant governor of the Province of Ontario in council may, notwithstanding anything herein contained, from time to time for any cause which may to the Government appear sufficient, by order in council make such regulations or impose such restrictions upon the export in the wood of any pulp wood or other timber cut upon the lands comprised in the said concessions or either of them, and may from time to time rescind, revoke, or vary any such order in council and make other regulations or impose other restrictions in lieu thereof.

This contract was introduced in evidence by the importer and in connection therewith a letter, of which the following is a copy, was also offered by importer and received by the board.

Toronto, December 3, 1912.

T. H. WATSON, Esq.,

Vice President, The Spanish River Pulp & Paper Mills (Ltd.),

Toronto.

DEAR SIR: In answer to your inquiry, I beg to say that the privilege of exporting pulp wood conferred by the Government upon your company by agreement dated November 25, 1912, became by that agreement immediately effective, and your company has ever since the making of that agreement been and is now at liberty to export pulp wood free from any restriction.

Yours, truly,

W. H. HEARST,

Minister of Lands, Forests, and Mines.

At the hearing before the board Mr. Bicknell, a member of the legal profession in Toronto, apparently well versed in the law of Canada as well as that of the Province of Ontario, and who is a director of and counsel for the importer, testified in its behalf. Among other things, he said that neither the Dominion of Canada nor the Province of Ontario imposed any export duty, export license fee, or other export charge of any kind upon wood cut from concessions owned by the importing company; that prior to 1900 neither said Dominion nor said province by statute imposed any export duty, export license fee, or other export charge upon pulp wood; that at the date of importer's original grants there was no law in Canada or said province prohibiting or restricting such export, and that it could only be done by contract.

He further testified that in 1900 a statute was enacted, presumably by the Province of Ontario, which provided, with reference to grants thereafter made, that there should be imposed by the Crown a restriction against export; that this statute was inoperative as to the before-mentioned grants of the importer because subsequently enacted; that the importer desired the prohibition of export contained in the existing contracts of which it was the assignee, removed, because it was thereby hampered in competing with other manufacturing concerns in Canada which were able to export news-print paper and pulp to this country; that the main business of the importer was the manufacture of pulp and paper; that he conducted for the importer with the provincial minister of Crown lands the negotiations which led to the making of the contract of November 25, 1912, above recited; that he pointed out to him that the object of the prohibition of exportation, as contained in the original grants, had been accomplished by the establishment of importer's manufacturing plants in Canada; that its business was manufacturing, and not exporting, raw material; that the removal of the prohibition could not

result in any large exportation of wood because the importer's mills were in Canada and it was more profitable for the importer to manufacture the pulp wood there than to export it; that a good deal was said between the minister and himself upon the subject of whether the desired removal of the prohibition would result in allowing extensive exportation of pulp wood, and that in fact it had resulted in the exportation of only a comparatively small quantity of pulp wood, only one shipment thereof, so far as the witness knew or had heard of.

It also appeared from the testimony of the secretary of the importing company that the annual output of its mills at Espanola and Sturgeon Falls at and prior to November 25, 1912, was 76,000 tons of pulp and paper; that at and prior to said date the number of hands employed thereat on the average was 650 and the number employed in logging operations 1,360; that the two additional paper machines required to be installed on or before July 1, 1913, were actually contracted for about October 1, 1912; that the approximate output of these two machines would be some 18,000 tons per annum; that all the wood cut on the concession lands was driven to the mill on streams; and that wood cut on private lands was also used by the importer in manufacturing pulp and paper. All the foregoing evidence was uncontradicted.

There was no evidence other than the above from which any inference might be drawn as to what the output of these mills had been since November 25, 1913, or what number of hands had been employed thereat or in the woods by the importer.

Paragraph 406 of the act of 1909, which it is unnecessary to quote in full, and under which the merchandise was assessed, fixes a duty upon wood pulp, but provides, however, that it shall be admitted free of duty from any country or province which does not in any way by law, contract, or otherwise, directly or indirectly, forbid or restrict the exportation of or impose any export duty, fee, or other charge either directly or indirectly upon printing paper, wood pulp, or wood for use in the manufacture of wood pulp, with a provision for countervailing duties under certain conditions therein stated.

Section 2 of the act of Congress entitled "An act to promote reciprocal trade relations with the Dominion of Canada, and for other purposes," approved July 26, 1911, under which the importer claims, provides that—

Pulp of wood mechanically ground; pulp of wood, chemical, bleached, or unbleached; newsprint paper, and other paper, and paper board, manufactured from mechanical wood pulp or from chemical wood pulp, or of which such pulp is the component material of chief value, colored in the pulp, or not colored, and valued at not more than four cents per pound, not including printed or decorated wall paper, being the products of Canada, when imported therefrom directly into the United States, shall be admitted free of duty, on the condition precedent that no export duty, export license fee, or other export charge of any kind whatsoever (whether in

the form of additional charge or license fee or otherwise), or any prohibition or restriction, in any way, of the exportation (whether by law, order, regulation, contractual relation, or otherwise, directly or indirectly), shall have been imposed upon such paper, board, or wood pulp, or the wood used in the manufacture of such paper, board, or wood pulp, or the wood pulp used in the manufacture of such paper or board.

From the evidence above recited it appears that at the time the original grants were made there was no law in force under which an export tax, charge, or fee was imposed upon pulp wood cut on Crown lands in and exported from the Province of Ontario and that the subsequent statute imposing a restriction thereon does not apply to the lands covered by importer's concessions. The importer here, therefore, claims by reason thereof and by force of paragraph numbered 4 in said contract of November 25 that, under the authority of the decision of this court in the case of *Cliff Paper Co. v. United States* (4 Ct. Cust. Appls., 186; T. D. 33435) where in substance we held that the condition precedent to free entry provided in section 2 related to the individual importation in each case, the merchandise here is entitled to free entry and consequently that there was no error below. In other words, importer claims that upon the execution of said last-named contract it became thereunder *eo instante* entitled to export free from any restriction any pulp wood cut on the concession lands and so entitled to enter free of duty the ground wood pulp in this case.

The importer did not show any performance by it subsequently to November 25, 1912, of the conditions set forth in paragraphs numbered 1, 2, and 3 of said contract and no discussion by either party is had of the question of what, if anything, was necessary to be shown in that respect as a prerequisite of its enjoyment of the right of exportation. We therefore dismiss without considering or discussing any question which might perhaps be raised relating thereto.

In the case of *Cliff Paper Co. v. United States*, *supra*, Martin, Judge, discussing the circumstances which must be present in order that similar merchandise might under said section 2 be entitled to free entry, said:

It is thus provided by the condition precedent that free entry into this country shall be had by Canadian paper or wood pulp only when the given paper and wood pulp, and the wood from which they were manufactured, are entitled to exportation from Canada free of any export charge or prohibition or restriction of exportation.

It is contended by appellant that the foregoing construction opens the door to flagrant abuse and evasion of the section in practice. This objection is answered by a reference to the very comprehensive provisions of the section itself, which deny free entry to the enumerated articles if they, or the wood from which they were manufactured, are subject upon exportation to any export duty, export license fee, or other export charge whatsoever, whether in the form of additional charge or license fee or otherwise, or any prohibition or restriction in any way of exportation, whether by law, order, regulation, or contractual relation or otherwise, directly or indirectly.

It appeared in that case that the merchandise—chemical wood pulp manufactured in Canada—was free from any export charge or prohibition or restriction of exportation, and that the right to like free exportation was possessed by the pulp wood from which it had been manufactured.

In the case at bar, there being no export tax, charge, or fee imposed upon the pulp wood from which the ground pulp is made, the only question is, whether there is any prohibition or restriction in any way of exportation by contractual relation either directly or indirectly within the meaning of said section 2.

The determination of this question requires an interpretation of the last-mentioned contract, considered as a whole, in the light of the surrounding circumstances under which it was made.

Briefly the circumstances were these: On the 25th day of November, 1912, the importer was the owner, subject to the conditions and provisos contained in the written instruments relating thereto, of certain concessions or grants of the right to cut pulp wood and other wood upon large tracts of Crown lands in the Province of Ontario for a period of substantially 21 years, which has not yet expired. The enjoyment of these concessions by the importer was upon the condition, among other things, that it should establish and equip in Canada pulp and paper mills at an expense of at least \$1,500,000 (and which appear in fact to have required an outlay of upward of \$3,000,000), and that it should continuously maintain and operate the same to the extent of producing annually at least 35,000 tons of pulp and paper and should employ on an average 400 hands in connection therewith. These concessions prohibited the importer from cutting wood on the lands covered thereby for the purpose of exporting the same in the wood and from selling the same to other persons for export in that condition. On said day it was, and for some time prior thereto had been, producing more than the stipulated amount of product, and was, and had been, employing more than the prescribed number of workmen in connection therewith. It was competing with other Canadian concerns in the exportation of news-print paper and pulp to the United States, and found itself hampered therein because of said prohibition. Thereupon it set about obtaining relief therefrom and entered into negotiations which resulted in the contract of November 25. It had no desire or intention, and so represented to the Crown minister, who negotiated and executed the contract, to export pulp wood to the United States in any considerable amount, but its intent and purpose was to obtain relief from said prohibition in order that it might export to the United States its news-print paper and pulp without paying duty thereon, which it could not do so long as the prohibition was in force. At the

time it was, and ever since has been, contrary to the declared public policy of the Province of Ontario to permit the free and unrestricted exportation of pulp wood cut upon Crown lands under any concession granted after the year 1900.

Without here indulging in any discussion of the objects intended to be accomplished by Congress in enacting said section 2 or reviewing the legislative history relating thereto (reference for that purpose being made to the opinion in the Cliff Paper Co. case), it is apparent that one purpose which animated Congress in its enactment was to promote the unrestricted exportation of pulp wood from Canada to the United States.

The section, however, provides, as pointed out by Martin, Judge, in the language above quoted, that to entitle wood pulp to free entry, not only that there shall be no prohibition of exportation thereof or of the wood from which the same is made, but also that there shall be no *restriction* of such exportation, and the inquiry therefore is, as stated, whether in this contract there is to be found any direct or indirect restriction of exportation of pulp wood cut on the Crown lands in question.

It is manifest that the installing of the additional machines, the employment of the additional help, and the production of the increased output are all new conditions to be performed by the importer in order that it may enjoy the right of export and as a continuing consideration therefor, and that the conditions in the old contracts requiring the continued maintenance of the manufacturing plants in Canada, the production therein of the specified annual product of 35,000 tons, and the employment of the stipulated help are by the new contract also required to be performed by the importer as a condition and continuing consideration for the enjoyment of the same right.

A restriction means a restraint, a limitation, a confinement within certain limits, and one can hardly refrain from querying, if it was intended by the contract of November 25 to remove *all* restrictions upon exportation, why it was not therein stated in simple language, in substance, that the Spanish River Pulp & Paper Mills (Ltd.) was thereby unconditionally relieved and released from the prohibition of export in the earlier contracts provided, notwithstanding anything therein contained to the contrary. This would have left the company entirely free to cut and export pulp wood if it is so desired without compelling it to return, yield, or pay any consideration therefor, and would clearly have accomplished what it is urged *was* accomplished. The importer could then have exported all or any part of the pulp wood cut by it upon Crown lands without incurring any liability to have its rights under the various grants terminated by reason thereof. In other words, its right of export would have been wholly free and unrestricted.

But the parties instead of this elected to contract that certain conditions, some new, some old, and all to be observed and performed by the importer, should be the consideration for the abrogation of the prohibition of export and of the grant of the right thereof. It matters not whether they be considered as conditions precedent or subsequent to the enjoyment of the right, they are burdens undertaken by the importer and to be borne by it so long as the right to export pulp wood continues.

As compared with a concession, the enjoyment of which was dependent only upon the payment of a fair price for stumpage, reasonable skill and prudence in logging operations, and which in no manner restricted the right to export pulp wood, which would be one illustration of a contract permitting its unrestricted export, we think the contract in this case would, in the business world, clearly be regarded as imposing a limitation or restriction upon such export.

One necessary and direct result of the contract is that, to the extent of the pulp wood required to manufacture at least 50,000 tons of pulp and paper annually, there is no right of export whatever, because it can not be exported, but must be manufactured in Canada. By compelling the importer to continuously maintain and operate therein a manufacturing business to the extent and in the manner provided by the contract as a consideration for the granted right of export of pulp wood, material benefits from which maintenance and operation must accrue to the Province of Ontario and its inhabitants, that Province is compelling and receiving substantial tribute of a financial nature for such right. The real purpose and effect of the imposed conditions are to restrict such export, notwithstanding it is in terms declared to be unrestricted, and if any pulp wood is exported pursuant thereto it in fact sustains and bears its proportionate share of such tribute.

It follows, therefore, that whether these importations are a part of the required annual product of 50,000 tons or are part of an excess thereof (the evidence is silent on this question), they are not entitled to free entry as claimed, because the importer has not an unrestricted right to export the pulp wood from which they are manufactured.

The fact that the importer on November 25 was manufacturing more than the then stipulated amount of product or was employing a greater number of workmen than it was then required to employ does not make against this conclusion, because its conduct in that regard was voluntary while the new contract made an increased output and the employment of more workmen obligatory. Neither is it material that it was then more profitable to manufacture the pulp wood in Canada than to export it, because that condition may change, and if it does the importer will be confronted with the alternatives of carrying on one branch of its business at a small or no profit, or even at a

loss, in order to conduct another part, the exportation of pulp wood at a profit, or of submitting to a revocation of its concessions.

The conclusion we reach is really but giving effect to the intent of the parties in making the contract, because on the one hand the importer's object in executing it was to obtain so far as it might the naked right of export without intending to exercise it to any substantial degree but for the purpose of enabling it more successfully to compete with other Canadian manufacturers. On the other hand, the Government's intent was to see to it that but little pulp wood was exported as a consequence of its being entered into, and to make certain this result the Government by the contract armed itself with or rather expressly reserved to itself the right, from time to time and for any cause appearing to it to be sufficient, by order in council to make regulations and impose restrictions not only upon the exportation of pulp wood but of any other wood or timber cut on said concession lands.

We are all impressed with the view that the effect of the contract in question was to clothe the importer with the *nominal* but not the *real* right of unrestricted export of pulp wood, and that the construction thereof claimed by the importer would result in an evasion of our statute, which is designed to prevent restriction of every kind in the export of pulp wood from Canada and its provinces and gives free entry only to pulp wood and certain of its products when the wood is entitled to unrestricted export. We are unwilling either to adopt such a construction or assent to such a result.

The judgment of the Board of General Appraisers is *reversed*.

IWAKAMI & Co. v. UNITED STATES (No. 1265).¹

MINERAL WATER—WHAT NOT.

"Nigari" is not palatable, is not used as a drinking water nor for medicinal purposes, but is used in the cooking of certain oriental dishes. This article is not to be taken as a mineral water as contemplated by paragraph 312, tariff act of 1909. The record does not disclose with precision facts necessary in making a true classification of the merchandise.

United States Court of Customs Appeals, April 28, 1914.

APPEAL from Board of United States General Appraisers, Abstract 33376 (T. D. 33695).

[Reversed.]

William Hayward for appellants.

William L. Wemple, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, of counsel; *Henry H. Childress*, special attorney, on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

DE VRIES, Judge, delivered the opinion of the court:

This is an appeal involving the proper dutiable classification of what is commonly known as "Nigari," a water imported from Japan at

¹ Reported in T. D. 34427 (26 Treas. Dec., 734).

the port of San Francisco. It was rated for dutiable purposes by the collector of customs at that port as a mineral water under paragraph 312 of the tariff act of 1909, which provides for "all mineral waters and all imitations of natural mineral waters, and all artificial mineral waters not specially provided for in this section * * *." The importers contend that this assessment was erroneous, and, among other things which we here deem unimportant, that the merchandise was dutiable either as a nonenumerated unmanufactured article or as a nonenumerated manufactured article under the provisions of paragraph 480 of said act. The Board of General Appraisers, resting its decision upon its conclusion in two previous cases, Abstract 22595 (T. D. 30294) and Abstract 19128 (T. D. 29056), involving the same product, affirmed the decision of the collector. Testimony was offered before the Board of General Appraisers which is exceedingly unsatisfactory. It is disconnected, contradictory, and uncertain. While the witnesses attempted to describe the method of production of the article, no certain, definite conclusion can be reached by reading all the testimony together. The board appreciated this fact, resting its decision largely if not wholly upon previous decisions of the board. Those decisions, however, were rested more upon a lack than the sufficiency of evidence. It does appear in the record without contradiction that the article is not palatable, that it is not used as a drinking water nor for medicinal purposes, but that it is used in the cooking or preparation of certain oriental dishes. This testimony is uncontradicted. We do not think that such an article is within the classification of mineral waters as that term is used by Congress in the paragraph quoted. The lexicographic authorities are uniform upon the subject and we think accord perfectly with the common everyday understanding that a mineral water imports something suitable and used for drinking or medicinal purposes.

Thus the Century Dictionary and Cyclopedia speaks of a mineral water as follows:

A name given to certain spring waters so far impregnated with foreign substances as to have a decided taste and a peculiar operation on the physical economy.

The Standard Dictionary speaking to this subject recites:

A natural water coming from a spring and containing some characteristic mineral ingredient, as carbon dioxide or a lithium salt. Mineral waters are extensively used in medicine and are described according to their ingredients. The phrase has also been largely applied to artificial waters made by dissolving the salts in pure water.

Webster's New International Dictionary in defining the subject says:

Any natural water so impregnated with gaseous or saline substances as to have a particular flavor or medicinal effect; also water artificially so impregnated.

Perhaps the best definition is found in the Oxford Dictionary, which gives the original and modern meaning and present application of the term, as follows:

Originally, water found in nature impregnated with some mineral substance, usually such as is used medicinally. * * * Later, applied also to artificial imitations of natural mineral waters; *e. g.*, soda water, seltzer water and in recent use extended to include other effervescent drinks, as lemonade and ginger beer.

We do not think that this imported merchandise can fairly be said to fall within that definition. There is not in this record, however, sufficient testimony to satisfactorily establish the method of production of the imported article. Some parts of the testimony would indicate it the product of methods devised and pursued for the express purpose of producing the imported article, whilst other portions of the testimony would indicate it a mere by-product or accidental incident to the manufacture of salt which has not undergone any manufacturing processes, but which is merely something which exudes or is expressed from the salt.

The burden of proof that it was or was not a manufactured article was upon the importers, and having failed in this it is beyond the province of the court to so find. We think the record, unsatisfactory as it is, clearly establishes that the assessment by the collector was erroneous; that the article is either a nonenumerated manufactured or unmanufactured article; that there is not sufficient testimony in the record to determine whether it is one or the other. Accordingly the decision of the Board of General Appraisers is *reversed*. It would seem upon this record to be dutiable as a nonenumerated manufactured article.

STINER & SON *et al.* v. UNITED STATES (No. 1331).¹

"ARTICLES" AND "LACES."

In the first proviso to paragraph 349, tariff act of 1909, there was no purpose to use the term "article" in the restricted sense of something completed. *Field v. United States* (73 Fed., 808). And the connection in which the term "laces" occurs indicates that laces were regarded and treated as articles—articles composed of material or goods specified in the paragraph—thus differentiating this case from *Altman v. United States* (5 Ct. Cust. Appls. 170; T. D. 34251). The aim was to bring within the higher rate the article which had the more expensive work done upon it.

United States Court of Customs Appeals, April 28, 1914.

APPEAL from Board of United States General Appraisers, G. A. 7509 (T. D. 33959), G. A. 7510 (T. D. 33960).

[Affirmed.]

Brown & Gerry for appellants.

William L. Wemple, Assistant Attorney General (*Martin T. Baldwin*, special attorney, of counsel), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES and MARTIN, Judges.

¹ Reported in T. D. 34428 (26 Treas. Dec., 736).

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

This case again brings before the court for construction paragraphs 349 and 350 of the tariff act of 1909. The two paragraphs read as follows:

349. Laces, lace window curtains, and all other lace articles; handkerchiefs, napkins, wearing apparel, and all other articles made wholly or in part of lace or laces, or in imitation of lace; nets, nettings, veils, veilings, neck ruffings, ruchings, tuckings, flutings, quillings, embroideries, trimmings, braids, feather stitch braids, edgings, insertings, flouncings, galloons, gorings, bands, bandings, belts, beltings, bindings, cords, ornaments, ribbons, tapes, webs, and webbings; wearing apparel, handkerchiefs, and other articles or fabrics embroidered in any manner by hand or machinery, whether with a plain or fancy letter, initial, or monogram, or otherwise, or tamboured, appliquéd, or scalloped, by hand or machinery, for any purpose, or from which threads have been drawn, cut, or punched to produce openwork, ornamented or embroidered in any manner herein described, in any part thereof, however small; hemstitched or tucked flouncings or skirtings; all of the foregoing, composed wholly or in chief value of cotton, flax, or other vegetable fiber, or of cotton, flax, or other vegetable fiber and india rubber, or of cotton, flax, or other vegetable fiber, india rubber, and metal, and not elsewhere specially provided for in this section, sixty per centum ad valorem: *Provided*, That no article composed wholly or in chief of value of one of more of the materials or goods specified in this paragraph, shall pay a less rate of duty than the highest rate imposed by this section upon any of the materials or goods or which the same is composed: *And provided further*, That no article or fabric of any description, composed of flax or other vegetable fiber, or of which these materials or any of them is the component material of chief value, when embroidered by hand or machinery, or having hand or machinery embroidery thereon, shall pay a less rate of duty than that imposed in this section upon any embroideries of the materials of which such embroidery is composed.

350. Laces, embroideries, edgings, insertings, galloons, flouncings, nets, nettings, trimmings, and veils, composed of cotton, silk, artificial silk, or other material (except wool), made on the Lever or Gotherough machine, seventy per centum ad valorem: *Provided*, That no wearing apparel, handkerchiefs, or articles of any description, composed wholly or in chief value of any of the foregoing, shall pay a less rate of duty than that imposed upon the articles or the materials of which the same are composed.

The importation consists of lace imported in continuous lengths, made up of lace made by sewing Lever edgings onto an embroidered net, Plauen lace, made by attaching pieces of embroidered Lever net to other pieces or embroidery or lace, and lace made by working a pattern with threads, by hand, upon a Lever net. In none of these laces is the Lever-made portion the component material of chief value. Duty was assessed on the merchandise at the rate of 70 per cent ad valorem, as provided by paragraph 350, by authority of the first proviso to paragraph 349.

It is conceded that within the holding of the court in *Stein v. United States* (2 Ct. Cust. Appls., 519; T. D. 32250) the articles in question would be dutiable at the rate fixed by paragraph 350 if the importation is to be treated as an article. But it is contended that the word "article" is used in this connection in a restricted sense. That the term "article" as employed in tariff statutes is broad enough to include lace in the piece is clearly established by the authorities.

See *Junge v. Hedden* (146 U. S., 233) and *Stursberg, Schell & Co. v. United States* (3 Ct. Cust. Appls., 370; T. D. 32963). Indeed this is not controverted by the importer, but it is said that the word "article" may and is often employed in a more narrow sense as relating to a completed article to the exclusion of more crude material. It is true that where the text discloses such a use of the term as to indicate an intended distinction, the narrower meaning has been attributed to the term, as in *Salomon v. United States* (2 Ct. Cust. Appls., 92; T. D. 31635), cited by counsel for appellant. We think, however, that evidence that the term was employed in this narrow sense is not afforded by the terms of the statute here in question. The question is much like that presented in the cases of *United States v. McBratney* (105 Fed., 767) and *Schulemann v. United States* (123 Fed., 1002), which two cases when read together strongly support the construction contended for by the Government.

The case of *Field v. United States* (73 Fed., 808) is more directly in point, as it arose under the paragraph of the act of 1890, corresponding to paragraph 349 of the act of 1909. The importation consisted of cotton muslin in the piece, 30 yards by 30 inches, having a hem on one side and a frill about 3 inches wide. It was said:

The context of this particular provision must furnish the clue to the sense in which the word is employed in paragraph 373. The provision speaks of "laces, edgings, insertings, neck ruffings, ruches, tuckings, lace window curtains and other similar tamboured articles." These, it is stated, are imported in the piece and sold by the yard, although lace window curtains are also sold by the set. The correct interpretation of the language here employed includes tamboured articles similar to laces, edgings, etc., whether sold by the yard or as a completed article. The word "article," as employed in this particular clause, should therefore be construed in its general sense as indicating a commodity. Then follows the phrase, "articles embroidered by hand or machinery." We observe no reason to declare the word is here used in its restricted sense to indicate a completed article.

So the general scheme of the present paragraph being considered, a purpose to use the term "article" in the restricted sense is not to be attributed to Congress. The connection in which the term "laces" occurs indicates that laces were regarded and treated as articles, and they were articles composed of material or goods specified in the paragraph. This circumstance differentiates this case from that of *Altman v. United States* (5 Ct. Cust. Appls., 170; T. D. 34251). The paragraph makes provision for a great variety of articles, such as lace edgings and made-up articles of various kinds, and then, evidently with the purpose of avoiding the possibility of the importer escaping the rate fixed by paragraph 350 and possibly others, the first proviso was adopted. For this purpose it was just as essential to protect laces in the piece as more advanced articles. The aim manifestly was to bring within the higher rate the article which had the more expensive work expended upon it.

The decision of the board sustaining the action of the collector is *affirmed*.

UNITED STATES *v.* BARTLEY BROS. & HALL (Nos. 1284, 1285).¹

TRAVELING SETS—TOURIST OR WRITING CASES.

The included penholder, lead pencil, and lead-pencil holder of the importation, when put up or assembled in a form which permits of their being conveniently carried by a traveler as a part of the baggage to which he has daily access, may be, and properly are, designated as traveling sets. They were dutiable as such under paragraph 452, tariff act of 1909.—United States *v.* Mark Cross Co. (4 Ct. Cust. Appls., 274; T. D. 33489).

United States Court of Customs Appeals, May 4, 1914.

APPEAL from Board of United States General Appraisers, Abstract 33671 (T. D. 33763).

[Reversed.]

William L. Wemple, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, of counsel; *William A. Robertson*, special attorney, on the brief), for the United States.

Brown & Gerry for appellees.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

DE VRIES, Judge, delivered the opinion of the court:

The merchandise the subject of this appeal is represented by two samples marked, respectively, Exhibit 1, 622865, and Exhibit 2, 629525. They consist of leather cases having in each a number of receptacles of sufficient size and proper adjustment to hold stamps, postcards, writing paper, and envelopes. There is in each, in addition, two loops, calculated to hold a lead pencil, pen, or other similar article.

The facts shown by the testimony are stipulated in the record. This stipulation recites—

That these exhibits are composed in chief value of leather; that they could be used for traveling and are sold by the importers under the name of tourist or writing cases.

The question presented by the appeal is whether or not this merchandise comes within the last provision of paragraph 452 of the tariff act of 1909 as being cases made wholly or in chief value of leather "permanently fitted and furnished with traveling, bottle, drinking, dining or luncheon and similar sets." The paragraph as an entirety may be quoted as follows:

452. Bags, baskets, belts, satchels, card cases, pocketbooks, jewel boxes, portfolios, and other boxes and cases, made wholly of or in chief value of leather, not jewelry, and manufactures of leather, or of which leather is the component material of chief value, not specially provided for in this section, forty per centum ad valorem; any of the foregoing permanently fitted and furnished with traveling, bottle, drinking, dining or luncheon and similar sets, fifty per centum ad valorem.

The Board of General Appraisers reversed the collector, holding that that portion of the importation represented by the above-

¹ Reported in T. D. 34441 (26 Treas. Dec., 767).

described samples did not fall for dutiable purposes within the last part of paragraph 452, and accordingly sustained the protests. The Government appeals.

An analysis of paragraph 452 discloses that the application of the last provision thereof is made to depend not upon the character of the bag, box, or case, or the method of its construction, but upon the character of its contents. The fact that the Congress has therein enumerated the character of the sets covered thereby as "traveling, bottle, drinking, dining or luncheon and similar sets," indicates that it was not the intention of Congress that all bags or cases which, though otherwise within the paragraph, might be permanently fitted with articles, should fall for dutiable purposes within this provision of the law, but only that limited number which fell within the enumerated designations or were of the same character. The internal logic of the paragraph argues that the Congress assumed that there would be permanently fitted bags, boxes, cases, etc., which would not fall for dutiable purposes within the provisions of this portion of the paragraph so precisely limited. Likewise, the employment by the Congress of the word "permanently" in the last provision of the paragraph manifests a further limitation upon its amplitude. Being a part of the legislative expression it must be given some effect, and when it is sought to classify articles for dutiable purposes under this provision of the law due regard must be had to this prescribed limitation by Congress and full effect given thereto.

This court in *United States v. Mark Cross Co.* (4 Ct. Cust. Appls., 274; T. D. 33489) analyzed and construed this provision of the law. The case is here applicable. Exhibit 1, *supra*, contains within the receptacles of the case a single card containing certain postal information, some very plain writing paper and envelopes, a penholder, and a lead pencil. Exhibit 2, *supra*, is identically equipped save that in lieu of the single lead pencil there is a lead pencil holder as well as penholder. We are not inclined in the presence of the word "permanently" in the statute to hold that stationery, such as would be entirely consumed by use, comes within the legislative description. Permanently, however, should not be held to mean everlasting. Ordinarily, while paper and envelopes are exhausted by a single use, lead pencils and penholders are of considerable duration, extending, no doubt, far beyond a single or several journeys, and in many instances might prove as durable or lasting as the case itself. A lead pencil holder, or lead pencil, and a penholder, constituting the furnishings and fittings of a traveling case, are permanent articles, and such are ordinarily incident to the necessities and conveniences of a traveler. The statute seems to include within this provision of the law whatever may be classed as a "traveling" set as well as "bottle," "drinking," "dining," or "luncheon and similar" sets.

In *United States v. Mark Cross Co.*, *supra*, this court held that two articles would constitute a "set" within this provision of the law, and paraphrasing that decision so as to be here applicable we may well say, with reference to the included penholder, lead pencil, and lead-pencil holder, that "such articles and accessories when found in the home are generally known as writing articles, but when put up or assembled in a form which permits of their being conveniently carried by the traveler as a part of the baggage to which he has daily access while traveling they may be and properly are designated as traveling sets." True it is, as claimed by counsel for the importers, that the penholder without the pen and the lead-pencil holder without the lead are incomplete articles. They are, nevertheless, not less complete for their intended use than are the bottle, drinking, dining, or luncheon sets unfilled. The permanent part of such articles and the whole thereof is present, and that is what is required by the statute shall be present. The absence of the pen from the penholder, of the lead from the lead-pencil holder, and of the contents from the bottle, or drinking, or dining, or luncheon sets is the absence of but the temporary, changeable, usable portion or accessory thereof, and therefore not a permanent portion. The entire permanent portion, however, of such articles is present, and being present for that reason the statute is satisfied.

Reversed.

UNITED STATES v. OLYMPIC CLUB (No. 1286).¹

STATUE IMPORTED FOR A CLUB.

The principal purpose of the Olympic Club is to encourage athletics, and to do this a regular corps of teachers is employed to give systematic physical instruction. Such an institution is engaged in educational work and a statue artistic in character imported for exhibition in the club falls within the terms of paragraph 715, tariff act of 1909, and was entitled to free entry.

United States Court of Customs Appeals, May 4, 1914.

APPEAL from Board of United States General Appraisers, Abstract 33652 (T. D. 33763).

[Affirmed.]

William L. Wemple, Assistant Attorney General (*Martin T. Baldwin*, special attorney, of counsel), for the United States.

Carl A. Hansmann for appellee.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

SMITH, Judge, delivered the opinion of the court.

A marble sculpture of the Greek boxer Kreugas, copied by the sculptors Moretti and Rinaldi from the famous statue executed by Canova in the year 1790, was classified by the collector of customs at

¹ Reported in T. D. 34442 (26 Treas. Dec., 770).

the port of San Francisco as a "sculpture" and assessed for duty at 15 per cent ad valorem under that part of paragraph 470 of the act of 1909 which reads as follows:

470. * * * Sculptures, not specially provided for in this section, fifteen per centum ad valorem; but the term "sculptures" as used in this act shall be understood to include only such as are cut, carved, or otherwise wrought by hand from a solid block or mass of marble, stone, or alabaster, or from metal, and as are the professional production of a sculptor only, * * *.

The importer protested that the statue was a work of art entitled to free entry either under paragraph 715 or under paragraph 716 of the free list, which paragraphs, in so far as pertinent, are as follows:

Free list:

That on and after the day following the passage of this act, * * *, the articles mentioned in the following paragraphs shall, when imported into the United States, * * *, be exempt from duty:

* * * * *
715. Works of art, * * * antiquities and artistic copies thereof in metal or other material, imported in good faith for exhibition at a fixed place by any State or by any society or institution established for the encouragement of the arts, science, or education, or for a municipal corporation, and all like articles imported in good faith by any society or association, or for a municipal corporation for the purpose of erecting a public monument, and not intended for sale, nor for any other purpose than herein expressed; * * *: *Provided*, That the privileges of this and the preceding section shall not be allowed to associations or corporations engaged in or connected with business of a private or commercial character.

716. Works of art, productions of American artists residing temporarily abroad, or other works of art, * * * imported expressly for presentation to a national institution, or to any State or municipal corporation or incorporated religious society, college, or other public institution, * * * except any article, in whole or in part, molded, cast, or mechanically wrought from metal within twenty years prior to importation; but such exemption shall be subject to such regulations as the Secretary of the Treasury may prescribe.

At the hearing, however, the claim that paragraph 716 was applicable to the importation was abandoned and accordingly whether the statue was within the meaning and intention of paragraph 715 became the only issue in the case.

The Board of General Appraisers found that the subject matter of the controversy was a work of art, the replica of an ancient piece of statuary wrought by Canova, and that it was entitled to free entry inasmuch as it had been imported by a society or association for no purposes other than those expressed in paragraph 715. The protests were therefore sustained by the board and from that decision the Government appealed.

In support of the appeal it is contended that the importation is not within any of the requirements for free entry prescribed by the statute, first, because the importer is not a society or institution established for the encouragement of art, science, or education; second, because the statue was not imported for exhibition at a

fixed place; and, third, because the importer is not a society or association organized for the purpose of erecting a monument.

The importer is the Olympic Club, of San Francisco, which, as appears from the evidence, is an incorporated society without capital stock organized not for profit or business but solely to encourage amateur athletics, to promote physical culture, and to advance social intercourse among its members. The membership is divided into nine classes, known as active, charter, life, honorary, nonresident, army and navy, athletic, junior, and juvenile members. Active members are such as are elected to that class by a committee on admissions and are required to pay an admission fee of \$100 and \$5 per month as dues. Charter members owe their membership to the fact that they were identified with the original organization of the club and are required to pay no dues. Life members are elected in the same manner as active members and are required to pay an admission fee of \$500 but no dues. Honorary members become such on account of some striking service to the club or public and by unanimous consent of the directors; they are not obliged to pay either an admission fee or dues. The junior membership is made up of such sons, wards, and brothers of members as are over 16 and under 21 years of age, and the juvenile membership of such sons, wards, and brothers of members as are under 16 years of age. Athletic members are of two kinds—those elected by the board of directors on recommendation of the athletic committee, and those who are either athletic coaches and managers of certain universities or students distinguished in athletics and who are in attendance on such universities or on high schools bordering on the Bay of San Francisco. The dues of junior members are \$2 per month, the dues of juvenile members \$1.50 per month, and the dues of student members such as may be fixed by the board of directors. The right to hold office and the right to a voice and vote in the affairs of the club is vested in the active, charter, and life members, and upon them alone is imposed all liability for club indebtedness and assessments. The privileges of the club to be enjoyed by junior, juvenile, and student athletic members are prescribed by the directors, but all other members are entitled to such privileges as of right.

Athletics and physical culture are, as appears from the by-laws, the distinguishing features of the club, and the purposes to the advancement of which its energies are principally directed. In furtherance of the two objects which give the institution its distinctive character, it provides a gymnasium, a swimming tank, and the usual gymnastic appliances for the promotion of athletics and the development of the physical man. Had it stopped there the importer might well be regarded as differing in no essential particular from those social organizations which furnish facilities for physical im-

provement, the use of which is left to individual initiative without direction or systematized instruction. From the evidence in this case, however, it would seem that the Olympic Club goes further than that and that its activities have a very much wider range than those which characterize the ordinary social or athletic club. It furnishes a corps of teachers and professors for the instruction of its membership in physical culture, and that those excluded by their youth from the privileges of full membership may take advantage of such instruction, it opens its doors not only to members' sons, wards, and brothers who are under the age limit, but also to all students of the universities and high schools adjacent to San Francisco who have distinguished themselves in athletics. Junior and juvenile members are organized into classes for instruction in athletics and physical culture and to them at least knowledge of those subjects is imparted in a systematic way and by a teaching force apparently skilled in the work.

The purposes for which the club was chiefly organized and the methods adopted for their successful accomplishment clearly establish a design to promote, advance, and encourage athletics and physical culture, and that brings us to the consideration of the question of whether work of that kind may be properly regarded as educational. We think it can. Education means the training and development of the moral, intellectual, and physical faculties of man by means adapted to secure the intended result and intelligently applied. Complete training and development of the psychical and physical nature of the individual would of course be perfect education, but so far as we can find no such task has ever been seriously undertaken by any single educational institution. Whether the corporeal or the incorporeal part of the human make-up should receive attention, and whether both receiving consideration more emphasis should be placed on the development of the one than the other, has always depended on the subsisting condition of society and the prevalent relation of the individual to his fellows and the State. Originally food, shelter, clothing, and the common defense depended largely, if not exclusively, on physical skill, and training of the eye and the hand was as much education for primitive peoples as is the training of the mind for us. Even when civilization had progressed very considerably and the systematic cultivation of mind and morals found a larger place in the scheme of human existence, physical culture continued to be regarded as of first importance, and not until modern times, comparatively speaking, did the cultivation of the intellect become a predominant factor in educational work. The schools, colleges, or universities of these days devote themselves, it is true, largely to the arts and sciences, which call for intellectual training, and few, if any, are the educational institutions which make physical culture a feature of the curriculum. Nevertheless, from that it can

not be safely argued that a course of instruction which has for its aim physical perfection has ceased to be educational. As was well said by Mr. Justice Paynter, in *German Gymnastic Association v. Louisville* (80 S. W., 201):

Education is not confined to the improvement and cultivation of the mind. It may consist in the cultivation of one's religious or moral sentiments. It likewise may consist in the development of one's physical faculties.

The housing of a sound mind in a sound body makes as much now as it ever did for intellectual efficiency, and the institution which devotes itself solely to physical culture is just as much entitled to be ranked as educational as one which has no other purpose than the teaching of music, or painting, or sculpture. *Mount Hermon Boys' School v. Gill* (145 Mass., 139, 146); *Ruchs v. Backer* (6 Heisk., 395-400); *Matter of Moses* (138 N. Y. App. Div., 525, 528-529).

The Olympic Club has as its principal purpose the encouragement of athletics and physical culture. To carry this purpose into effect it organizes classes in athletics and provides a regular corps of professors and teachers upon whom is imposed the duty of giving systematic instruction in physical culture. It makes its appeal to the young, those who are still in the receptive stage. It not only cultivates friendly relations with the schools and universities in its vicinity, but in a measure it identifies itself with them by making students thereof distinguished in athletics partakers of its advantages and of the opportunities for physical betterment which it affords. Such an institution is, in our opinion, engaged in educational work, and therefore may be regarded as giving encouragement to education. *German Gymnastic Association v. Louisville*, *supra*; *Matter of Mergentime* (129 N. Y. App. Div., 367, 371-373).

The contention of the Government that the statue was not imported "for exhibition at a fixed place" as required by paragraph 715 is predicated on the assumption that the term "exhibition" necessarily implies a *public* display, and on the further assumption that the statue was not brought into the country by a public institution, but by a private social club to which it does not appear that the public is ever admitted. The privilege of importing works of art free is not confined by the statute to *public* institutions, and if it were it might be argued with some force that the Olympic Club is entitled to the designation, inasmuch as it systematically occupies itself with work designed to promote to some extent the public welfare. But however that may be, we do not think that the provision of paragraph 715, which prescribes "importation for exhibition" as a condition for free entry, necessarily requires that works of art shall be exposed to view in a public place or that they shall be open to the inspection of the people at large at all times without rule or regulation. Such an interpretation would exclude from the benefit of the provision art schools and museums which reserve to themselves the

right to say when, how, and to what extent the art treasures collected by them shall be viewed by people not identified with such institutions, and would limit the provision to societies and associations importing works of art for exhibition in parks, squares, public buildings, and other similar public places. We think that Congress intended no such result as that to follow and that if works of art imported by any society or institution established for the encouragement of art, science, or education are designed to be displayed in a fixed place where those who wish may see them upon compliance with reasonable rules and regulations they are imported for exhibition, even if that term implies a *public* display, as contended by the Government.

Under the by-laws of the Olympic Club any person not a member may secure the privileges of the club house for a whole day twice a year by having his name registered by a member in the "visitors' book." Such a regulation, it seems to us, affords to all who ought to see the statue in question ample opportunity to do so and is no more burdensome than would be the securing of a permit to visit an art school or museum. Whether the Olympic Club is a society or an association for the erection of a public monument we deem it unnecessary to consider, holding, as we do, that the club is an institution for the encouragement of education and that the statue under consideration was imported for exhibition at a fixed place.

The decision of the Board of General Appraisers is *affirmed*.

UNITED STATES *v.* MILLER & TOKSTAD *et al.* (No. 1294). UNITED STATES *v.* MOOS & Co. *et al.* (No. 1302). UNITED STATES *v.* STROHMEYER & ARPE Co. (No. 1324).¹

HERRINGS UNDER PARAGRAPH 272, TARIFF ACT OF 1909.

In view of the decisions of the courts and Board of General Appraisers and in view of departmental rulings besides, it must be taken that the various small fish of the several importations come within the provision for herrings in paragraph 272, tariff act of 1909, and not within paragraph 270 of that act, as fish packed in tin boxes or cans.

United States Court of Customs Appeals, May 4, 1914.

APPEALS from Board of United States General Appraisers, G. A. 7504 (T. D. 33815), Abstract 34000 (T. D. 33848), Abstract 34389 (T. D. 34033).

[Affirmed.]

William L. Wemple, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, of counsel), for the United States.

B. A. Levett and Brown & Gerry for appellees.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

DE VRIES, Judge, delivered the opinion of the court:

Three appeals from as many decisions of the Board of General Appraisers covering importations of fish in tins.

¹ Reported in T. D. 34443 (26 Treas. Dec., 775).

In United States, appellant, *v.* Miller & Tokstad *et al.*, appellees, the imported merchandise consisted of the following classes: (1) Fish described in the invoices as herrings; (2) fish described in the invoices as mackerel; and (3) fish described in the invoices as sardines put up in bouillon, tomato sauce, vinegar, or mustard sauce.

In United States, appellant, *v.* Moos & Co. *et al.* (Von Bremen, Asche & Co.), appellees, the merchandise consisted of sprats and smoked sardines in tomato sauce in tins.

In United States, appellant, *v.* Strohmeyer & Arpe Co., appellees, the merchandise consisted of sprats in tomato sauce and anchovies salted and spiced in tins.

All of the merchandise above described was assessed with duty at the rate of 30 per cent ad valorem as "fish * * * packed in * * * tin boxes, or cans," under the provisions of paragraph 270 of the tariff act of 1909, which reads:

270. Fish (except shellfish) by whatever name known, packed in oil, in bottles, jars, kegs, tin boxes, or cans, shall be dutiable as follows: When in packages containing seven and one-half cubic inches or less, one and one-half cents per bottle, jar, keg, box, or can; containing more than seven and one-half and not more than twenty-one cubic inches, two and one-half cents per bottle, jar, keg, box, or can; containing more than twenty-one and not more than thirty-three cubic inches, five cents per bottle, jar, keg, box, or can; containing more than thirty-three and not more than seventy cubic inches, ten cents per bottle, jar, keg, box, or can; all other fish (except shellfish) in tin packages, thirty per centum ad valorem; fish in packages, containing less than one-half barrel, and not specially provided for in this section, thirty per centum ad valorem; caviar, and other preserved roe of fish, thirty per centum ad valorem.

As to the classes of merchandise 1 and 2, the subject of the first-stated appeal, the following stipulation was entered into:

It is hereby stipulated and agreed that the merchandise described on the invoices covered by the below-numbered protests as fried herrings in bouillon, smoked herrings in tomato sauce, smoked herrings in tomato, fat herrings in bouillon, and merchandise described as herrings in protest 558916, is herrings, smoked; that the merchandise described as herrings in tomato, tomato herrings, herrings in tomato sauce, and fresh herrings in tomato sauce is herrings, salted; and that said merchandise is of the same dutiable character as that passed on by the Board of United States General Appraisers in G. A. 7380 (T. D. 32680); * * * that the merchandise described as marinated mackerel is mackerel, pickled.

No controversy was waged in this court as to the dutiable classification of these two classes of merchandise. The decision of the Board of General Appraisers was to the effect that the herrings were dutiable at the rate of one-half of 1 cent per pound under the provision for "herrings, pickled or salted, smoked or kippered," in paragraph 272 of the tariff act of 1909, and that the mackerel were dutiable at the rate of 1 cent per pound as "mackerel, * * * pickled," under paragraph 273 of said act. This decision is in accordance with the decision of this court in *Ahlbrecht & Son v. United States* (2 Ct. Cust.

Appls., 471; T. D. 32226). The remaining class of merchandise covered by that appeal, together with that the subject of the other appeals stated, was claimed by the importers to be properly dutiable as herrings at the rate prescribed, according to condition, as provided for in paragraph 272 of said act, which reads as follows:

272. Herrings, pickled or salted, smoked or kippered, one-half of one cent per pound; herrings, fresh, one-fourth of one cent per pound; eels and smelts, fresh or frozen, three-fourths of one cent per pound.

The weights and condition of the merchandise covered by the protests were duly set out in the opinion of the Board of General Appraisers in accordance with stipulations found in the record and need not here be repeated.

Eliminating these descriptive details there is presented to this court for decision the one question whether or not the various descriptions of fish above given are "herrings" as that term is used in paragraph 272 of the tariff act of 1909.

The relative specificity of the provisions of the two competing paragraphs, 270 and 272, and the scope of each has been the subject of previous decisions of this court. *United States v. Rosenstein* (1 Ct. Cust. Appls., 304; T. D. 31357); *Ahlbrecht & Son v. United States* (2 Ct. Cust. Appls., 471; T. D. 32226); *United States v. Smith & Nessel Co. et als.* (4 Ct. Cust. Appls., 70; T. D. 33312); *United States v. Haaker & Co. et als.* (4 Ct. Cust. Appls., 471; T. D. 33884). It may therefore be regarded as settled that the term "herrings" as used in paragraph 272 is more specific than the term "fish * * * packed in * * * tin boxes, or cans" as used in paragraph 270.

That being regarded and treated as *stare decisis* the Government undertook at the trial below to show that the term "herrings" as used in paragraph 272 was employed in a commercial sense and that it should be applied to a certain, uniform, and definite class of fish which excluded those enumerated as the subjects of these appeals. The board found that the proof offered by the Government failed to establish such a commercial understanding or usage. An examination of the record discloses that this finding of the board is amply justified by the testimony in the case. Indeed, every witness produced by the Government in his testimony seemed rather to dispute than to establish any such uniform and general trade understanding or usage.

We are therefore left to determine whether or not the word "herrings," as used in paragraph 272, in its common and ordinary acceptation includes the above enumerated fish, the subject of these appeals.

While the trade testimony introduced by the Government failed to establish a general, uniform usage which assigned to the word

"herrings" a definite class of fish, which excluded therefrom sprats, sardines, and anchovies, the testimony offered did establish *pro tanto* that among merchants dealing for many years in these variously named fish it was commonly understood by them that the sardines, anchovies, and sprats imported into this country and put up in the manner as was this imported merchandise are all deemed to belong to the class of fish commonly known as herrings. It is unnecessary for the purposes of this case to analyze in detail the testimony in the record, the result of which would be but an extended and unprofitable review of evidence which amply, and we think unquestionably, supports the above statement.

The record contains also much evidence as to the scientific understanding of the relationship of the respectively enumerated fish. Some of the controversy was had by reason of the inaccuracy of the record in the first instance to properly express the scientific testimony given by one of the witnesses who is a recognized authority upon the subject. Corrections have been made by stipulation of the respective parties and presented as a part of the record in this court, and when examined in connection with the recognized standard works on the subject, pertinent excerpts from which were likewise properly introduced in the case, a general and uniform result is produced. The herring is scientifically known as a *Clupeidae*. That is the family name. Included within this family name are different genera of *Clupeidae* or *Clupea*, which in turn respectively embrace various species. Thus, there is the *Clupea spratus*, which is a specie of herring known as the bristling or sprat. These imported anchovies seem to be but bristlings or sprats put up in a certain way. The *Clupea pilchardus*, or pilchard, which comes from the Mediterranean and is the true sardine, while classed by some authorities as of the genus *Clupanodon* and others *Clupea* nevertheless comes in the *Clupeidae* or herring family. So there is the *Clupea* herrings and *Clupea pallasi* or California herring—all of the *Clupeidae* or herring family. Upon the whole it satisfactorily appears from the record that all the classes of fish covered by these importations are of the herring or *Clupeidae* family.

Lexicographic authority brings us to the same conclusion. Thus sardines are defined in the Standard Dictionary as—

One of various small clupeoid fishes preserved in oil as a delicacy, especially the European pilchard (*Clupea pilchardus*). * * * The young of the herring * * *.

Likewise the sprat is mentioned in the Standard Dictionary as the young of the herring.

The briefs in this court refer *in extenso* to the departmental holdings upon this subject. They, likewise, with much industry and thoroughness review the decisions of the Board of General Appraisers

and of the courts. While there may be found some expressions of divergence from that view, upon the whole it quite uniformly appears to have been held for a long period of time by the department, the Board of General Appraisers, and the courts that the word "herrings" as used in many preceding tariff acts included sprats, sardines, and anchovies. Whatever may be said in criticism of the completeness of the uniform trade references, or the scientific understanding, or the departmental and judicial view upon the subject, there seems to be no escape from the conclusion that it is fairly established by a great preponderance of the evidence in the record and emphasized throughout these various sources that in common understanding the word "herrings" includes the various species of fish as imported in these cases.

We are the more impressed with this conclusion and that it was the view taken by the Congress upon the enactment of the respective paragraphs of the tariff law under consideration by a reference to "Notes on Tariff Revision." With these notes before it for information and guidance the Congress enacted the respective competing provisions of the tariff act under consideration.

Under the head of general information, at page 318, "Notes on Tariff Revision," it is stated:

The *anchovy* is a small, richly flavored, herring-like fish caught in the waters of southern Europe. * * *

The *sprat* is a small European herring, also called garvie. It is allied to the common herring and sardine or pilchard.

Bristlings are a small European herring, usually brought into this country canned, and probably sold as sardines or sardelles.

It is significant that in the corresponding paragraph of the tariff act of 1897, which was paragraph 258, paragraph 270 read:

Fish known or labeled as anchovies, sardines, sprats, bristlings, sardels, or sardellon, * * *.

With the above-quoted information before them Congress omitted these enumerations of fish from the act of 1909. Under the circumstances, with the information above quoted before them, taken in connection with the decisions of the courts, Board of General Appraisers and departmental rulings, of which they are deemed to take notice, there would seem to be no escape from the conclusion that by striking these words from the paragraph providing for fish packed in tin boxes or cans Congress must have known and intended that such importations would thereafter fall within the provision for herrings in paragraph 272, and we are of the opinion that upon the whole Congress so contemplated.

Affirmed.

HECHT & Co. v. UNITED STATES (No. 1297).¹

GOODS PARTLY, BUT NOT IN CHIEF VALUE, OF WOOL.

This merchandise—boys' suits—consisting of a blouse, flannel neckpiece, and trousers, were properly assessed under paragraph 382, tariff act of 1909. There was no purpose on the part of the Congress to limit that paragraph to woolen wearing apparel not otherwise provided for.

United States Court of Customs Appeals, May 4, 1914.

APPEAL from Board of United States General Appraisers, Abstract 33777 (T. D. 33789).

[Affirmed.]

Comstock & Washburn for appellants.

William L. Wemple, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, of counsel), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

SMITH, Judge, delivered the opinion of the court:

In this case boys' complete suits, consisting of a blouse, flannel neckpiece, and trousers, were classified by the collector of customs at the port of New York as articles of wearing apparel in part of wool, and accordingly the goods were assessed for duty under the provisions of paragraph 382 of the tariff act of 1909, which paragraph reads as follows:

382. On clothing, ready-made, and articles of wearing apparel of every description, including shawls whether knitted or woven, and knitted articles of every description made up or manufactured wholly or in part, felts not woven, and not specially provided for in this section, composed wholly or in part of wool, the duty per pound shall be four times the duty imposed by this section on one pound of unwashed wool of the first class, and in addition thereto sixty per centum ad valorem.

The importers protested that the goods were dutiable either at 60 per cent ad valorem under paragraph 349 or at 50 per cent ad valorem under paragraph 324, but from their brief it appears that they really rely on paragraph 324, which reads as follows:

324. Clothing, ready-made, and articles of wearing apparel of every description, composed of cotton or other vegetable fiber, or of which cotton or other vegetable fiber is the component material of chief value, made up or manufactured, wholly or in part, by the tailor, seamstress, or manufacturer, and not otherwise provided for in this section, fifty per centum ad valorem.

The Board of General Appraisers overruled the protest and the importers appealed.

As the wearing apparel is ready made, and is admittedly manufactured in chief value of cotton and in part of wool, it is apparent that the goods might be properly assessed for duty under either of the paragraphs cited were the other omitted from the act. Both paragraphs, however, are in effect, and as each prescribes a different rate of duty it is evident that both can not be applied to the merchandise. It is necessary, therefore, to determine which of the two

¹ Reported in T. D. 34444 (26 Treas. Dec., 779).

paragraphs should be made applicable to the goods, and as that involves a determination of which of the paragraphs is the more specific the question presented by the appeal is one of law and nothing more.

The appellants claim that paragraph 324 is more specific than paragraph 382, and base their contention in that behalf on the fact that it has been judicially determined that a provision for "wearing apparel composed wholly or in chief value of cotton, and not otherwise provided for," is more specific than a provision for "wearing apparel composed wholly or in part of wool, and not specially provided for." *Hartranft v. Meyer* (135 U. S., 237). The Government admits the doctrine contended for by the appellants, but insists that it can not be invoked in this case, for the reason that the provision for wearing apparel in chief value of cotton is not brought into competition with a provision for wearing apparel in part of wool, *not specially provided for*, but with a provision which embraces all wearing apparel in part of wool, without restriction or limitation.

With this as the definite issue between the Government and the importers, it would seem that the decision of the case is made dependent on whether paragraph 382 shall be interpreted as providing for wearing apparel composed wholly or in part of wool or for wearing apparel composed wholly or in part of wool *and not specially provided for*. We think that the history of the paragraphs under consideration and the decisions of the courts make it apparent that Congress intended that wearing apparel composed wholly or in part of wool should be subjected to the operation of paragraph 382, and that there was no purpose on its part to limit that paragraph to woollen wearing apparel not otherwise provided for. We base this opinion on the fact that in the tariff acts of 1883, 1890, and 1894 the provisions for wearing apparel composed wholly or in part of wool were by express language confined in their operation to wearing apparel *not specially provided for*, whereas the provisions on the same subject in the tariff acts of 1897 and 1909 contained no such limitation and in terms were broad enough to cover all wearing apparel in part of wool. The pertinent parts of the woollen wearing apparel paragraphs of the acts of 1883, 1890, 1894, and 1897, are as follows:

1883..

Schedule K. Clothing, ready-made, and wearing apparel of every description, *not specially enumerated or provided for in this act*, * * *, composed wholly or in part of wool, * * * made up or manufactured wholly or in part by the tailor, seamstress, or manufacturer, except knit goods, forty cents per pound, and in addition hereto thirty-five per centum ad valorem.

1890.

396. On clothing, ready made, and articles of wearing apparel of every description. made up or manufactured wholly or in part *not specially provided for in this act*, felts

not woven, and *not specially provided for in this act*, and plushes and other pile fabrics, all the foregoing, composed wholly or in part of wool, * * * the duty per pound shall be four and one-half times the duty imposed by this act on a pound of unwashed wool of the first class, and in addition thereto sixty per centum ad valorem.

1894.

284. On clothing, ready made, and articles of wearing apparel of every description, made up or manufactured wholly or in part, *not specially provided for in this act*, felts *not specially provided for in this act*, all the foregoing composed wholly or in part of wool, * * * valued at above one dollar and fifty cents per pound, fifty per centum ad valorem; valued at less than one dollar and fifty cents per pound, forty-five per centum ad valorem.

1897.

370. On clothing, ready-made, and articles of wearing apparel of every description, including shawls whether knitted or woven, and knitted articles of every description, made up or manufactured wholly or in part, felts not woven and *not specially provided for in this act*, composed wholly or in part of wool, the duty per pound shall be four times the duty imposed by this act on one pound of unwashed wool of the first class, and in addition thereto sixty per centum ad valorem.

[The italics are ours.]

The part of Schedule K above set out was considered in *Hartranft v. Meyer, supra*, and, as contended by importers, was held to be a less specific enumeration of wearing apparel composed of silk and wool. silk chief value, than that part of Schedule L which provided for goods not specially enumerated or provided for and in chief value of silk. The qualifying phrases "not specially enumerated or provided for" and "not specially provided for," which were distinguishing characteristics of the woolen wearing apparel provisions of the acts of 1883, 1890, and 1894, were, however, amended out of the law by paragraph 370 of the act of 1897, thereby making paragraph 370 applicable without restriction to wearing apparel of every description in part of wool and consequently excepting such merchandise from the operation of any other provision which in terms was confined to wearing apparel not specially provided for. *Zucker v. Magone* (37 Fed., 776); *Levi v. United States* (87 Fed., 193); *Stone v. Heineman* (100 Fed., 940). No change whatever was made in paragraph 370 of the act of 1897 by paragraph 382 of the act of 1909 save the substitution of the word "section" for "act" wherever used and the insertion of a comma after the phrase "felts not woven."

The appellants claim that the addition of the comma had the syntactic effect of relating back the phrase "not specially provided for" not only to "felts not woven," but to every preceding enumeration, and from that it is deduced that the paragraph covers only wearing apparel not specially provided for and is therefore virtually a reenactment of the law on the subject as it stood in 1883, 1890, and 1894. The contention is not convincing. "Felts not woven" and "wearing apparel wholly or in part of wool" were provided for by name in the

same paragraph for the first time in the act of 1890, and care was taken to insert after each enumeration the qualifying phrase "not specially provided for in this act," from which it may be fairly inferred that Congress placed more reliance on express language than on punctuation to exclude from the operation of the paragraph goods of either class elsewhere enumerated. Paragraph 396 of the act of 1890 was amended by paragraph 284 of the act of 1894 so as to include all felts and to exclude all plushes and other pile fabrics wholly or in part of wool, but barring that modification the first-mentioned paragraph was left unchanged and both provisions were limited in the very same manner and by the very same language to goods not specially provided for. When it came to the passage of the tariff act of 1897 the phrase which confined the woolen wearing apparel provisions to goods not otherwise provided for was dropped, and the provisions of the tariff acts of 1883, 1890, and 1894 on that subject were thereby extended, as held by the courts, to cover all wearing apparel in part of wool, even if composed in chief value of some other material. From this we think it is apparent that had Congress contemplated a return in 1909 to the legislation of 1883, 1890, and 1894, it would have used the language apt to the purpose found in prior acts and not manifested its intention in that behalf by the poor expedient of a comma, especially as the meaning of such language had been definitely determined by judicial interpretation and its use left no room for ambiguity.

The decision of the Board of General Appraisers is *affirmed*.

UNITED STATES *v.* MCCOY. (No. 1313).¹

PROTEST COVERING TWO ENTRIES WITH THE SAME RATE OF DUTY.

A protest may cover one or more entries of goods described in more than one invoice. Paragraph N of section 3, tariff act of October 3, 1913, relative to protests, was framed in view of a practice in the department, confirmed by the courts extending over many years, by which a single protest covered more than one entry. The words "claim in writing" appearing there instead of "protest in writing" can not be taken to alter a practice so established and so recognized.

United States Court of Customs Appeals, May 4, 1914.

APPEAL from Board of United States General Appraisers, G. A. 7515 (T. D. 33981).

[Affirmed.]

William L. Wemple, Assistant Attorney General (*William A. Robertson*, special attorney, on the brief), for the United States.

Comstock & Washburn for appellees.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

The importers filed a protest covering two entries of merchandise of like character, each entry having been made within 30 days prior

¹ Reported in T. D. 34445 (26 Treas. Dec., 783).

to the filing of the protest, the merchandise having in each instance been subjected to the same rate of duty by the collector, and the protest making the same claim as to each entry, that it was dutiable under another paragraph of the act. The collector exacted a protest fee of \$2, claiming that as the protest related to two separate entries it amounted in effect to two protests rather than one. By appropriate proceedings the importer presented for decision to the Board of General Appraisers the validity of this ruling. The contention of the importer was sustained, the board holding that the paper filed was but a single protest, and that but a single fee should have been exacted. From this decision the Government appeals and presents the question to this court for decision.

The issue is stated in the brief of the Assistant Attorney General as follows:

The Government holds that a protest in law is visible or audible evidence given to an official of the involuntary character of the payment of a demand which serves, if action be later brought, to avoid the operation of the rule that a voluntary payment can not be recovered; while the importers argue that the protest is itself the complaint which commences the action.

In ascertaining what is meant by the protest in paragraph N of section 3 of the act of 1913, it is important to ascertain in what sense the term was employed in customs procedure prior to and at the time of its enactment. The term "protest" was not the term employed in the customs administrative act of 1890, but in section 14 of that act the remedy was afforded to one who, dissatisfied with such decision, should give notice "in writing to the collector, setting forth therein distinctly and specifically, and in respect to each entry or payment, the reasons for his objections thereto, and if the merchandise is entered for consumption shall pay the full amount of the duties and charges ascertained to be due thereon."

In Andrews' Manual of Customs Laws, published in 1904, this provision is referred to as providing for a protest (see p. 539), and, what is more important, the Customs Regulations of 1899, referring to the protest and the requirements, uses the word "protest" all the way through, and this same course is pursued in the treasury regulations of 1908, where, in article 1069, it is said "the notice of dissatisfaction filed by the importer is for convenience called a protest," and so in board decisions and in decisions of this court, the term is employed to indicate the notice in writing required by the laws to protect the rights of the importer. It will be seen, therefore, that the term "protest" came to have a distinct and clear meaning in customs law. The question is whether such protest or notice in writing required by law is what is referred to by the term as employed in paragraph N, and could it include more than one entry.

In Andrews' Manual of Customs Laws, at pages 539-540, are given forms of protest which are adapted to claims in a single protest on

any number of entries, showing the entry number, the vessel, when entered, when liquidated, and marks and numbers. Not only is this true, but the record in this case establishes that it was common practice prior to the act of 1913 to include in a single protest claims under various or different entries. So that when the Congress used this term in 1913, it must have had in mind this departmental and court practice extending over a period of years, and it is no introduction of a new meaning to the term to give it effect as relating to the written document or notice of dissatisfaction filed by the importer, nor to give it a meaning which includes such a written document making complaint of more than a single entry. This was consistent also with the provision recited in the Customs Regulations, article 1069, according with the statute, namely:

That the decision of the collector as to the rate and amount of duties chargeable upon imported merchandise * * * shall be final and conclusive against all persons interested therein, unless the owner, importer, consignee, or agent of such merchandise * * * shall, within ten days after "but not before" such ascertainment and liquidation of duties, as well in cases of merchandise entered in bond as for consumption, or within ten days after the payment of such fees, charges, and exactions, if dissatisfied with such decision give notice in writing to the collector, setting forth therein distinctly and specifically, and in respect to each entry or payment, the reasons for his objections thereto.

Now, in the face of this provision, which constituted the customs regulations, in paragraph 1460 of 1899 and paragraph 1069 of the Customs Regulations of 1908, the board and the court have since permitted, and there have been frequently used, protests covering more than a single entry, thus involving the view obtaining at the bar and apparently in the courts that the expression "setting forth therein distinctly and specifically and in respect to each entry and payment the reasons for his objections thereto," implied that there might in a single protest be occasion to refer to more than a single entry or payment and to state objections to each.

So far as the question has been directly dealt with by the courts, the holdings sustain this right. Under the act of 1845 (5 Stat. L., 727), providing that no "action shall be maintained against any collector to recover the amount of duties so paid under protest unless the said protest was made in writing and signed by the claimant, at or before the payment of said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof," it was held that a protest might cover two or more payments, and, furthermore, that it might be so framed as to cover all future importations. *Brune v. Marriott* (4 Fed. Cas., 475, No. 2052), affirmed in *Marriott v. Brune* (9 How., 619).

In section 14 of the act of 1864 (13 Stat. L., 214) it was provided that:

The decision of the collector of customs at the port of importation and entry as to the rate and amount of duties to be paid on the tonnage of such vessel or on such

goods, wares, or merchandise, and the dutiable costs and charges thereon, shall be final and conclusive against all persons interested therein, unless the owner * * * importer, consignee, or agent of the merchandise * * * shall, within ten days after the ascertainment and liquidation of the duties by the proper officers of the customs, as well in cases of merchandise entered in bond, as for consumption, give notice in writing to the collector on each entry, if dissatisfied with his decision, setting forth therein, distinctly and specifically, the grounds of his objection thereto.

The court, in *Ullman v. Murphy* (24 Fed. Cas., 506), held that a protest of future importations was no longer permissible. Construing the phrase "on each entry" the court said:

The reading which alone gives meaning and effect to those words is that in all cases, whether of entry in bond or for consumption, the owner shall give notice in writing, on each entry, to the collector, etc., not meaning on the paper or record called the entry-but *in respect of each entry*. This gives meaning and effect to all the language of the section, and it serves a very important purpose. * * * I can not give to that change any operation or effect without holding that the notice to be given to the collector must specify the entry or entries to which it applies, and that the statute is not satisfied by a protest declared by the importer to apply "to all future similar importations" by him.

The language of the opinion was not all necessary to a decision of the case. It is significant, however, that later statutes have employed the very language of Judge Woodruff by substituting for the phrase "on each entry" "in respect to each entry or payment." If this change in phraseology was suggested by the decision, it would not be a wide stretch to say that the purpose was to give effect to the other language of the decision, which clearly implies that more than one entry may be included in a single protest. But without reliance on this we are impressed by the practical construction of the language employed, as indicated above.

It comes then to a question as to whether, by the language employed in subdivision N of section 3, there has been any intentional departure from or condemnation of this practice. This subdivision contains much of the same language that was embodied in the customs administrative law of 1890 and repeated in the tariff act of 1909, down to the point of substituting the words "protest in writing" for "claim in writing." It reads as follows:

N. That the decision of the collector as to the rate and amount of duties chargeable upon imported merchandise, or upon merchandise on which duty shall have been assessed, including all dutiable costs and charges, and as to all fees and exactions of whatever character (except duties on tonnage), shall be final and conclusive against all persons interested therein, unless the owner, importer, consignee, or agent of such merchandise, or the person paying such fees, charges, and exactions other than duties, shall, within thirty days after but not before such ascertainment and liquidation of duties, as well in cases of merchandise entered in bond as for consumption, or within fifteen days after the payment of such fees, charges, and exactions, if dissatisfied with such decision imposing a higher rate of duty, or a greater charge, fee, or exaction, than he shall claim to be legally payable, file a protest or protests in writing with the collector, setting forth therein distinctly and specifically, and in respect to each entry or payment, the reasons for his objections thereto, and if the merchandise is entered for

consumption shall pay the full amount of the duties and charges ascertained to be due thereon. Such protest shall be deemed to be finally abandoned and waived unless within thirty days from the date of filing thereof the person who filed such notice or protest shall have deposited with the collector of customs a fee of \$1 with respect to each protest.

In the present case, the paper filed is in the form of a protest, protesting against the imposition of duties upon the like character of merchandise under the same provision of law and making claim of the same error therein in each case, all occurring within the period fixed by the statute, and setting out the same grounds of complaint, so that it is conceded to be sufficient either as a single protest or as two protests. There is no difficulty in finding that it points out with respect to each entry and payment the reasons for the objection of the importer thereto. Is there in this language a purpose to treat this protest in writing as anything other or different than the claim in writing which had been accorded the name of protest by customs administrative officers and by the courts during the whole history of the customs administrative act, and is the requirement for setting forth therein distinctly and specifically and in respect to each item or payment the reasons for objections thereto any more specific or any more evidence of a purpose to preclude the inclusion, in a single protest, of more than a single entry than was afforded by the previous legislation? We think not. On the other hand, we can not escape the conclusion that Congress followed as closely as the change in the form of words from "claim in writing" to "protest" or "protests" would admit the precise phraseology which had previously been contemporaneously construed by the board, by the department, and impliedly by the court. If we are right in this, then the provision that the protest shall be deemed "abandoned and waived unless within 30 days from the date of filing thereof the person who filed such notice or protest shall have deposited with the collector of customs a fee of \$1 with respect to each protest" is clearly referable to such protest as was common when this provision was enacted and relates to the protest which may cover one or more entries.

Under the act of 1890 and the like provision in 1909, the claim in writing (protest) was something more than a registering of dissatisfaction to the end of preserving rights if a *future* action should be taken. It was itself the institution of a proceeding to test the validity of the action of the collector and partook of the nature of a pleading, and was so treated and construed. It might, therefore, very properly include all claims having a like basis where the parties were the same, the question was the same or kindred, and—multifariousness being avoided—there was no apparent reason why such claim in writing might not relate to more than one entry so long as the importer set forth therein "distinctly and specifically, and in respect to each entry

or payment, the reasons for his objections thereto." The office of the protest provided for by paragraph N (which now assumes in the statute the name long since accorded to it in practice) is the same precisely as was that of the corresponding paper provided for under the previous law under the title of a "notice in writing." No narrow distinction between the two should be admitted. The language, "file a protest or protests in writing with the collector, setting forth therein distinctly and specifically, and in respect to each entry or payment, the reasons for his objections thereto" does not establish a purpose to change the practice. The introduction of the plural here might have a wider influence but for the fact that the language "in respect to each entry or payment" is still retained and is referable as well to "protest" as to "protests."

As was suggested in the opinion of General Appraiser Cooper, the words "distinctly and specifically and in respect to each entry or payment" modify and explain the manner of setting forth and by implication this manner of setting forth, including as it does a specification in respect of each entry or payment, implies that the protest may cover several entries so long as it sets forth the claims made in respect to each.

The plural of this sentence was doubtless a survival of the House measure, which provided that—

Each protest shall be limited to a single article or class of articles and to a single entry or payment, and issues of classification shall not be joined with other issues in the same protest.

It is significant that the Senate struck out this provision. The Assistant Attorney General concedes that in view of the history of this legislation, the filing as against a single entry of a number of statements in writing relating to various items of merchandise included in the same entry amounted to but a single protest within the provision requiring a fee on each protest. If this be so, on an entry requiring for convenience segregation of issues, it would seem that no rule against prolixity or multifariousness is violated when the protest covers all like issues falling within the period of time fixed by the statute. The fact that the requirement of return refers to a return of the invoice in the singular is not persuasive, as a single entry may include goods covered by more than one invoice, which under the Government's interpretations could all be included in a single protest.

The singular may be read as including the plural and the plural as though written in the singular, if the context warrants it. *State v. Kansas City, etc., R. R. Co.* (32 Fed., 722); *Ellis v. Whitlock* (10 Mo., 781); *Jocelyn v. Barrett* (18 Ind., 128).

We think the board reached the correct conclusion, and the decision is *affirmed*.

UNITED STATES *v.* SAUNDERS *et al.* (No. 1329).¹

TRANSFER OF CAUSE FROM ONE BOARD TO ANOTHER.

In this cause the only warrant that Board 1 had for deciding the question at issue was a so-called order of transfer made by the president of the Board of General Appraisers. This order was made after and not before trial, as prescribed by statute, and it conferred no authority on Board 1 to determine the issues involved in the protests. Moreover, as appears from the record, no opportunity was given, either to the Government or the importers, to appear and be heard.

United States Court of Customs Appeals, May 4, 1914.

APPEAL from Board of United States General Appraisers, Abstract 34156 (T. D. 33934).

[Reversed.]

William L. Wemple, Assistant Attorney General (*William A. Robertson*, special attorney, on the brief), for the United States.

Brown & Gerry for appellees.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

SMITH, Judge, delivered the opinion of the court:

In this case the collectors of customs at the ports of Buffalo and Ogdensburg, N. Y., classified certain scrap leather as waste not specially provided for and assessed it for duty at 10 per cent ad valorem under paragraph 479 of the tariff act of 1909. The importers claimed that the goods were free of duty under paragraph 581 as manures or substances used only for manure. The protest came on for hearing before Board 3 on June 18, 1913, at which time, the Government and the importers being represented by counsel, a trial of the issues presented by the protest was had and the matter submitted for decision. After the trial and submission of the case, for some reason not set out in the record, the whole proceeding was transferred to Board 1, which, apparently without a trial and without giving either of the parties any opportunity to be heard, rendered a decision sustaining the protests. From the decision of Board 1 the Government took an appeal to this court and now contends that Board 1 was without jurisdiction of the matter and that therefore its decision is wholly invalid and void. We think the Government's contention must be sustained. Section 28, subsection 12, of the tariff act of 1909 provides for the appointment of nine general appraisers of merchandise by the President, by and with the consent of the Senate, and requires that "said general appraisers of merchandise shall be divided into three boards of three members each, to be denominated, respectively, Board 1, Board 2, and Board 3."

Under the provisions of the section just referred to, all notices in writing of dissatisfaction with the collector's decision, together with the invoices and all papers and exhibits, are required to be forwarded to the board of nine general appraisers, to be assigned by rule thereof for hearing or determination or both, and each board

¹ Reported in T. D. 34446 (26 Treas. Dec., 788).

of three general appraisers or a majority thereof is clothed with full power to hear and determine all questions arising therein or assigned thereto. Under the same provision the president of the board of nine general appraisers may at any time *before trial*, under the rules of the board, assign or reassign any case for hearing, determination, or both. If, therefore, the case at bar originally arose in Board 3, or was assigned thereto, that board had jurisdiction not only to hear but also to determine and decide the matter, and that necessarily implied that none of the other boards was vested with authority either to try or decide the issues which the protests presented. It is true that by virtue of the very same section the president of the board of nine general appraisers may at any time *before trial*, under the rules of the board of nine general appraisers, assign or reassign any case for hearing, determination, or both, but neither that provision nor any other that we can find contemplates that the trial of a case may be had by one board and that it may be then reassigned or transferred to another for decision.

Section 14 of the customs administrative act of June 10, 1890, of which subsection 14 of section 28 of the act of 1909 is the successor, provided, among other things, that upon notice to the collector that the importer, consignee, or agent of imported merchandise was dissatisfied with the rate and amount of duties assessed thereon the invoice and all the papers and exhibits should be transmitted to "the board of three general appraisers, which shall be on duty at the port of New York, or to a board of three general appraisers who may be designated by the Secretary of the Treasury for such duty at that port or at any other port, which board shall examine and decide the case thus submitted, and their decision, or that of a majority of them, shall be final and conclusive upon all persons interested therein, * * *."

On these provisions it was held in *Prosser v. United States* (158 Fed., 971, 972) that the board to which the papers were transmitted had exclusive jurisdiction of the case and that that jurisdiction could not be challenged or taken away by a vote of nine general appraisers and that a decision by any other board was without jurisdiction and must be vacated. If under the act of 1890 a majority of the nine general appraisers could not deprive a board of the right to dispose of a case which it had been designated to examine and decide, it is difficult to understand how under the act of 1909 the reassignment or transfer of a case by the president of the board, after trial—and not before trial, as prescribed by the statute—could end the board's jurisdiction of an issue which the law in express terms gave it full power to hear and determine.

Board 3 had jurisdiction to determine the classification of imported goods and the rate of duty which should be assessed thereon, and as

that board was the first to assume authority over the case at bar we must infer that it was proceeding regularly, inasmuch as both parties appeared and no challenge to its right to hear the issues raised by the protests was ever interposed or made. In other words, the jurisdiction of Board 3 not having been directly attacked the existence of such jurisdiction must be presumed. *United States v. Park & Tilford* (4 Ct. Cust. Appls., 293, 296-297) and cases cited. As Board 3 had jurisdiction both of the parties and of the subject matter of the controversy, and as its right to proceed has never been put in issue, we must conclude that it had the exclusive power at first instance to pass on every question of law and fact necessary to a proper determination of the case. *United States v. Kurtz, Stuebbeck & Co.* (5 Ct. Cust. Appls., 142; T. D. 34192). Whether the board might lawfully proceed was one of those questions, and from that it follows that its authority over the matter could be terminated only by its own order or by the tribunal authorized by statute to review its decisions. If at the hearing the point had been made and established that the case had been properly assigned to Board 1, a decision by Board 3 that it had the right to try the case might have constituted reversible error, but having jurisdiction of the subject matter, and having assumed its exercise without objection, its authority over the case could not be ended merely by a subsequent assignment or by a vote of the whole board of nine general appraisers unless the law so provided. On the other hand, the jurisdiction of Board 1 having been directly attacked by a proper appeal, nothing can be presumed in favor of its jurisdiction, and unless the record affirmatively shows that it had the right to hear and determine the protests the exercise of jurisdiction over them can not be sustained. *United States v. Park & Tilford*, *supra*, and cases cited therein. So far as the record discloses the only warrant which Board 1 had for deciding the case was a so-called order of transfer made by the president of the Board of General Appraisers. That order must be regarded as a reassignment of the matter, and as it was made after, and not before trial, as prescribed by the statute, we must hold that it conferred no authority on Board 1 to determine the issues involved in the protests.

But even if the case had been properly assigned to Board 1, that Board was not authorized to make a decision of the issues involved without giving the parties an opportunity to be heard. If Board 1 had jurisdiction at all that fact gave it the right to *hear and determine*, but not the right to determine without a hearing or without an opportunity therefor having been afforded. *Windsor v. McVeigh* (93 U. S., 274, 284). The right of a judicial tribunal to take cognizance of a proceeding depends on whether it has jurisdiction of the subject matter and the parties, but its authority to adjudicate the

rights of litigants does not accrue until an opportunity has been afforded to the parties not only to appear, but to appear and be heard. *United States v. Park & Tilford* (4 Ct. Cust. Appls., 293, 298; T. D. 33514); *Windsor v. McVeigh*, *supra*. No hearing of the protests here in question was had by Board 1, and so far as appears from the record no opportunity was ever given to the Government or to the importers either to appear or to be heard. Under such circumstances a decision determinative of the protests was, in our opinion, in excess of the powers of Board 1, and on that ground, if on no other, we must hold the decision appealed from to be invalid and void. The decision of the Board of General Appraisers is *reversed*, and the matter remanded for such further proceedings as may be proper.

FRANK & Co. *et al.* v. UNITED STATES (No. 1161).¹

DRAWNWORK UNDER PARAGRAPH 349, TARIFF ACT OF 1909.

On a review of the judicial decisions affecting the classification of articles similar to those of the importation, and of the legislative action following upon those decisions, it is clear that paragraph 349, tariff act of 1909, was intended to subject ornamental openwork to the same duty imposed by that act on laces, embroideries, and the like.

United States Court of Customs Appeals, May 18, 1914.

APPEAL from Board of United States General Appraisers, G. A. 7445 (T. D. 33262).

[Affirmed.]

Curie, Smith & Maxwell (Thomas M. Lane of counsel) for appellants.

William L. Wemple, Assistant Attorney General (*Thomas J. Doherty*, special attorney, of counsel), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MARTIN, Judge, delivered the opinion of the court:

The merchandise involved in the present case consists of scarfs, squares, doilies, tidies, and similar articles of Japanese openwork or drawnwork, composed in chief value of flax. The articles are ornamented by having threads withdrawn from the woven fabric and the resulting open spaces partly filled with figures and designs formed by needlework, using for this purpose added or foreign threads—that is to say, threads other than those which composed the original fabrics. The ornamental figures and designs which are thus added to the fabrics produce lace-like effects in various forms, such as wheels, Maltese crosses, spider webs, and the like. Fabrics which are thus elaborated are indifferently called “drawnwork” or “openwork.”

The appraiser returned the merchandise for duty at 60 per cent ad valorem under the specific provision for openwork contained in

¹ Reported in T. D. 84469 (26 Treas. Dec., 837).

paragraph 349 of the tariff act of 1909, and duty was assessed accordingly. The importers duly filed their protest against the assessment, claiming that the merchandise was not governed by the openwork provision of paragraph 349, but was dutiable at 45 per cent ad valorem as manufactures of flax not specially provided for under paragraph 358 of the same act. The issue thus joined was submitted upon evidence to the Board of General Appraisers and the protest was overruled by the board. The importers now appeal from that decision.

The following is a copy of the relevant parts of paragraph 349, thus called into question, with the openwork provision in italics:

349. Laces, lace window curtains, and all other lace articles; handkerchiefs, napkins, wearing apparel, and all other articles made wholly or in part of lace or laces, or in imitation of lace; nets, nettings, veils, veilings, neck ruffings, ruchings, tuckings, flutings, quillings, embroideries, trimmings, braids, featherstitch braids, edgings, insertings, flouncings, galloons, gorings, bands, bandings, belts, beltings, bindings, cords, ornaments, ribbons, tapes, webs, and webbings; wearing apparel, handkerchiefs, and other articles or fabrics embroidered in any manner by hand or machinery, whether with a plain or fancy letter, initial, or monogram, or otherwise, or tamboured, appliqué, or scalloped, by hand or machinery, for any purpose, or *from which threads have been drawn, cut, or punched to produce openwork, ornamented or embroidered in any manner herein described, in any part thereof, however small*; hemstitched or tucked flouncings or skirtings; all the foregoing, composed wholly or in chief value of cotton, flax, or other vegetable fiber, or of cotton, flax, or other vegetable fiber and india rubber, or of cotton, flax, or other vegetable fiber, india rubber, and metal, and not elsewhere specially provided for in this section, sixty per centum ad valorem: * * *.

As has already been stated the articles at bar are ornamental openwork. They do not, however, bear any separate or independent ornamentation such as embroidery, tambouring, appliqué, or scalloping, in addition to their ornamentation as openwork. This distinction serves to define the real issue between the parties, for the importers contend that paragraph 349, *supra*, does not include or govern articles or fabrics which are simply ornamental openwork, but applies to such openwork only when it is also ornamented by separated or independent embroidery, tambouring, appliqué, or scalloping.

The importers base this contention upon the construction that the provision for openwork in paragraph 349, *supra*, is limited by the succeeding clause "ornamented or embroidered in any manner herein described," with the result that all openwork is excluded from the provision unless it is additionally ornamented or embroidered in some manner already specifically described in the paragraph. They contend that the paragraph names four "manners" of ornamentation, namely, embroidery, tambouring, appliqué, and scalloping. They therefore argue that the limiting clause excludes from the provision all openwork articles or fabrics which do not also bear separate ornamentation of one or more of these four classes.

In considering this question the classification of openwork under earlier tariff revisions becomes important. Prior to the act of 1909 openwork was not named *eo nomine* in the corresponding lace paragraph of any tariff revision. In the tariff act of 1890, paragraph 373, laces, embroideries, and tamboured articles composed of flax were grouped together under a specific enumeration and were subjected to a higher rate of duty than that imposed upon manufactures of flax not specially provided for. In the tariff act of 1894, paragraph 276, a like disposition was made of laces, embroideries, and tamboured articles composed of flax. In the tariff act of 1897 laces, lace articles, and articles made wholly or in part of lace or in imitation of lace composed of flax were grouped with tamboured and appliquéd articles and were subjected to a higher rate of duty than that imposed upon manufactures of flax not specially provided for. It may be noted again that none of the foregoing acts contained an *eo nomine* provision in the lace paragraph for openwork composed of flax.

Under the foregoing provisions, in the absence of an *eo nomine* provision for ornamental openwork, the question arose whether on the one hand such articles were subject to the higher duty as articles of lace or in imitation of lace, or as embroidered articles, or whether on the other hand such articles were subject only to the lower duty which was imposed upon manufactures of flax not specially provided for. This question was largely one of fact to be decided upon the given record and the decisions upon it were not uniform.

Under the tariff act of 1890, in the case of Neuss, Hesslein & Co., decided in 1892, such articles were held by the board to be dutiable at the higher rate as embroidered articles (T. D. 13506). Under the same act the board held in 1893, in the Hensel case, that similar articles were dutiable under the higher rate as embroidered articles (T. D. 14634). In the case of Neuss, Hesslein & Co. v. United States (142 Fed., 281), under the same act, the Circuit Court, Southern District of New York, held similar openwork articles composed of linen to be dutiable as embroidered articles. This case was decided in 1896.

Under the tariff act of 1897 there was a diversity of decisions upon this subject. Such articles were held by the board to be dutiable under that act as articles in imitation of lace (T. D. 21944); they were, however, held by the Circuit Court, Southern District of New York, upon the record in the case, not to be dutiable as articles in imitation of lace (131 Fed., 543). In the case of Beach v. Sharpe (154 Fed., 543), similar articles were held by the Circuit Court, Western District of Texas, to be dutiable under the act of 1897 as embroidered articles; they were held by the board to be dutiable under that act as either articles of lace or in imitation of lace or as embroidered articles, according to the character of the designs formed by the added threads (T. D. 27644); they were afterwards held by the board not to be

dutiable as embroidered articles (T. D. 30442) nor as articles in imitation of lace, Abstract 15449 (T. D. 28181). The last two decisions of the board were entered in conformity with the decisions next hereafter cited.

Two other cases under the act of 1897 may be cited which are entitled to special mention. They are the *Ulmann* and *Simon* cases, which were decided by the Circuit Court of Appeals, Second Circuit, and both were reported before the enactment of the tariff act of 1909, as were also the other cases above cited.

In the case of *United States v. B. Ulmann & Co.* (139 Fed., 3), the Circuit Court of Appeals, just named, held upon the record that ornamental openwork articles were not dutiable as lace or articles in imitation of lace under the tariff act of 1897, but were dutiable under the provision for fabrics of flax not specially provided for.

In the case of *United States v. J. R. Simon & Co.* (169 Fed., 106), the same court held upon the record that similar articles were not dutiable as embroidered articles, leaving them again to be assessed under the general provision for fabrics of flax not specially provided for.

At the enactment of the tariff act of 1909 the two decisions last named were the highest judicial interpretations of the provision in question as it appeared in the tariff act of 1897.

It may be noted that during this time plain or unornamental openwork had repeatedly been held to be dutiable as manufactures of linen or cotton not specially provided for and not as lace or articles in imitation of lace or as embroidered articles, and that the Government had apparently acquiesced in this conclusion.

In Notes on Tariff Revision (438, 439), a review was given of the litigation relating to ornamental openwork up to the time when that report was prepared, and the following statement was made upon the subject under the head of "Comments and Suggestions:"

This drawnwork, as it is called, belongs in the same class of articles as laces, which it resembles very strongly and is used in much the same way for producing ornamental effects in wearing apparel, table covers, bedspreads, and a multitude of articles which are ornamented with lace or made in part of lace. The term drawnwork appears to be well established, and it is believed that a specific provision for drawnwork incorporated in this paragraph would be an effective remedy for the present unsatisfactory state of the law.

The foregoing references are not intended to imply that prior to the enactment of the tariff act of 1909 the Government had formally acquiesced in the decisions against the assessment of such ornamental openwork as articles in imitation of lace or as embroidered articles, nor that the issues of fact made in the cited cases had up to that time been finally settled or foreclosed by the records which had been made up in those cases. Nevertheless it appears that at the time of the enactment of the tariff act of 1909 the two decisions of the Cir-

cuit Court of Appeals were the latest and highest judicial expressions upon the subject at issue; and that it was suggested to Congress in Notes on Tariff Revision that an *eo nomine* provision for such openwork should be incorporated in the lace paragraph in the revision then in preparation in order to end the controversy by making such openwork dutiable at the same rate as lace. The statement that such openwork "belongs in the same class of articles as laces, which it resembles very strongly," is certainly correct, for an inspection of the samples now before the court discloses that the ornamental figures and designs which are superimposed upon the articles are very similar to lace in construction and effect.

In the light of this history Congress, in the act of 1909, added to the corresponding lace paragraph of that act the *eo nomine* provision now in question for "articles or fabrics * * * from which threads have been drawn, cut, or punched to produce openwork."

The foregoing recital lends an overwhelming probability to the theory that Congress intended the new provision for openwork to have the effect of adding such articles to the lace paragraph as a response to the decisions reported in the foregoing cases and the suggestion made in Notes on Tariff Revision. In other words, since Congress was fully advised that ornamental openwork, as such, was not included *eo nomine* within the lace paragraph as written in the act of 1897, and that the court decisions had denied such articles classification under that paragraph, it is reasonable to conclude that Congress would not have added an *eo nomine* provision for such openwork to the paragraph except for the purpose of bringing the described articles within its provisions. It was concededly unnecessary to add such an enumeration for the purpose of bringing into the paragraph such ornamental openwork as was also ornamented by additional embroidery, tambouring, or appliquéing, for all such articles whether openwork or not were already admittedly within the terms of the paragraph under those enumerations. Nor did such embroidery, tambouring, appliquéing, or scalloping bear any essential relation to openwork as such. Under these circumstances it must be believed that Congress intended to act in accordance with the suggestion contained in Notes on Tariff Revision, above set out, and accordingly incorporated "a specific provision for drawnwork" in the new paragraph as an effective remedy for "the present unsatisfactory state of the law." According, however, to the contention of the importers Congress first enlarged the terms of the relevant paragraph so that it would include such openwork *eo nomine* in accordance with the suggestion, and thereupon immediately rendered the new provision entirely nugatory by adding a clause which deprived the provision of application to any kind of openwork as such. In other words, "the unsatisfactory state of the law" was allowed to

continue just as it was, notwithstanding the addition of an *eo nomine* enumeration of openwork in the paragraph. It can hardly be believed that such a construction reaches the true legislative purpose expressed in the enactment.

A review of the history of the provision in question at its enactment will sustain this conclusion. It passed the House in the following form:

345. * * * Wearing apparel, handkerchiefs, and other articles or fabrics embroidered in any manner by hand or machinery, whether with a plain or fancy letter, initial, or monogram, or otherwise, or tamboured, appliqué, scalloped, or hemstitched, by hand or machinery, or stitched in any manner for the purpose of ornamentation or embellishment, or from which threads have been drawn, cut, or punched to produce openwork; * * *.

The provision passed the Senate in the following form:

345. * * * Wearing apparel, handkerchiefs, and other articles or fabrics embroidered in any manner by hand or machinery, whether with a plain or fancy letter, initial, or monogram, or otherwise, or tamboured, appliqué, or scalloped, by hand or machinery, or from which threads have been drawn, cut, or punched to produce *ornamental* openwork, except hemstitching; * * *.

The difference just stated went to conference and the following appears in the conference report upon the subject:

Amendment numbered 528: That the House recede from its disagreement to the amendment of the Senate numbered 528, and agree to the same with an amendment as follows: In lieu of the matter inserted by said amendment insert the following: " * * * Ornamented or embroidered in any manner herein described, in any part thereof, however small; hemstitched or tucked flouncings or skirtings;" and the Senate agree to the same.—Congressional Record, 61st Cong., 1st sess. (vol. 44, pt. 5, p. 4764).

The provision was then enacted in the form first above copied in this decision.

It will be seen therefore that the House grouped all openwork, whether ornamental or plain, within the lace paragraph and subjected it all to the same high rate of duty as laces, embroideries, and tamboured or scalloped articles. The Senate, however, restricted the provision to "ornamental openwork" only. The provision thus went to conference carrying with it the expressed purpose of the House to cover thereby all openwork as such, and the expressed purpose of the Senate to cover thereby only ornamental openwork as such. Can it be believed that the conference report was intended or understood to mean an abandonment of both of these purposes and the enactment of a provision which did not cover any openwork at all as such? For, after all, that is the contention of the importers, namely, that openwork as such, whether plain or ornamental, is not included within the disputed provision, and that the provision includes only such openwork fabrics as are otherwise ornamented in such a manner as would bring them within the paragraph regardless of their character as openwork.

It is more reasonable to believe that the legislative purpose was to adopt the Senate amendment, which excluded plain openwork from the provision, and limited its application to ornamental openwork only, but provided at the same time that the higher rate should apply to such ornamental openwork as well as embroidered, tamboured, appliqué, and scalloped articles regardless of the small extent of such ornamentation upon any given article. This view is consistent with the following explanation of the conference report which was submitted to both Houses:

Amendments 523 to 535. Laces and articles embroidered and decorated have been classified and those inexpensively produced taken out of this paragraph, so that they fall within other classifications at lower rates of duty.—Congressional Record, 61st Cong., 1st sess. (vol. 44, pt. 5, p. 4655).

In view of the foregoing considerations the court is convinced that it was the legislative purpose to correct what was believed to be an infirmity of the act of 1897 by subjecting ornamental openwork to the same duty as was borne by laces, embroideries, and the like, which such ornamental openwork so nearly resembles in structure and use; and that the *eo nomine* enumeration in question was added to the relevant paragraph to that end. The modifying clause "ornamented or embroidered in any manner herein described, in any part thereof, however small," was intended to signify that such ornamented fabrics as would otherwise come within the provisions of the paragraph should not escape assessment thereunder because of the small part of the same which might be composed of the ornamentation in question. This, too, had been a subject of much litigation in the past, and the clause under consideration was designed to set the question at rest.

Nor is this interpretation inconsistent with the grammatical construction of the provision in question. For thereby the clause "ornamented or embroidered in any manner herein described, in any part thereof, however small," is made to apply alike to articles or fabrics embroidered, (articles or fabrics) tamboured, (articles or fabrics) appliqué, (articles or fabrics) scalloped, and (articles or fabrics) from which threads have been drawn, cut, or punched to produce openwork, from each and all of which enumerations the modifying clause is separated by the punctuation of a comma only. It may be objected that this construction, if literally carried out, would bring plain as well as ornamental openwork within the higher duty prescribed by the paragraph, but observing the use made of the term *ornamented* in the modifying clause and remembering the history of the provision as above recited, it is believed that this result does not follow.

It may be remarked that goods identical in character with those at bar were before this court upon a similar issue in the case of *Frank & Co. v. United States* (3 Ct. Cust. Appls., 216; T. D. 32534), but the issue in that case was decided solely upon the weight of the evi-

dence, and the question above discussed was not reached by the court upon that record. It may also be noted that the case of *Gardner & Co. v. United States* (2 Ct. Cust. Appls., 477; T. D. 32228), relating to scalloped articles, presented a question under the same paragraph so analogous to the present question that it may be cited as an authority upon the principle herein involved.

The decision of the board is *affirmed*.

DISSENTING OPINION.

DE VRIES, Judge: I am unable to concur in the majority opinion. That opinion adopts as the line of dutiable demarcation in drawn or open work the very uncertain criterion of whether or not the article is "ornamental." Aside from the very capricious character of such a standard its employment was expressly and affirmatively rejected by the Congress, and, in my opinion, one of certain, definite trade understanding written in the law in lieu thereof, to wit, that the goods should of necessity be found to be ornamented or decorated wholly or in part by tambouring, appliqué, embroidering, or scalloping.

It seems plain that the court here adopts a standard which was expressly rejected by the Congress. The legislative and judicial history which prompted this legislation had distinguished two distinct classes of drawn or open work, as follows:

1. Drawnwork formed solely by withdrawing threads or cutting or punching, and into which no extra or added threads have been introduced save to properly adjust the remaining threads not drawn from the fabric or bind or otherwise finish the drawn, cut, or punched areas, and which added threads do not *per se* form any figure or design. This class was held exempt from the higher rates of duty.

2. Drawnwork formed by withdrawing threads or cutting or punching and into or upon which extra or added threads have been introduced by which *per se* some figure or design is formed in or upon the fabric. This was the class the subject of extended litigation.

There criteria were founded upon definite, tangible, physical effects determinable alike by all concerned, while what is or is not ornamental would be vague and uncertain, differing according to the judgment of different appraisers and importers.

The paragraph evolved as a result of long litigation and legislative consideration in so far as pertinent reads:

349. Laces, lace window curtains, and all other lace articles; handkerchiefs, napkins, wearing apparel, and all other articles made wholly or in part of lace or laces, or in imitation of lace; * * * wearing apparel, handkerchiefs, and all other articles or fabrics embroidered in any manner by hand or machinery, whether with a plain or fancy letter, initial, or monogram, or otherwise, or tamboured, appliqué, or scalloped, by hand or machinery, for any purpose, or from which threads have been drawn, cut, or punched to produce openwork, ornamented or embroidered in any manner herein described, in any part thereof, however small; * * *.

It would seem that if that view must prevail the context of the paragraph read in the light of its judicial and legislative history would well warrant the adoption of this well-settled line of demarcation.

That the dutiable test adopted by the court, of whether or not drawn or open work was ornamental, was not only not the intention but expressly repudiated by Congress is demonstrable.

While suggestions made to Congress in Notes on Tariff Revision (438-439), quoted in the majority opinion, observed these distinctions, 1 and 2 *supra*, they were not observed by the responsive paragraph of the bill as reported into and passed by the House, the language of which would include both said classes of drawnwork. In so far as pertinent it read:

345. Laces, lace window curtains, and all other lace articles; handkerchiefs, napkins, wearing apparel, and all other articles made wholly or in part of lace or laces, or in imitation of lace; * * * wearing apparel, handkerchiefs, and other articles or fabrics embroidered in any manner by hand or machinery, whether with a plain or fancy letter, initial, or monogram, or otherwise, or tamboured, appliqué, scalloped, or hemstitched, by hand or machinery, or stitched in any manner for the purpose of ornamentation or embellishment, or from which threads have been drawn, cut, or punched to produce openwork; * * *.

Obviously this language would include class 1 of drawnwork, which has therein threads of adjustment and hemstitching in finishing the parts of the fabrics cut or drawn or punched, not alone in adjusting the remaining undrawn threads into fancy effects, but in protecting and probably embellishing the edges left unfinished by the drawing, cutting, or punching.

As reported in the Senate this paragraph retained the number of 345 and in so far as pertinent was amended to read as follows:

345. Laces, lace window curtains, and all other lace articles; handkerchiefs, napkins, wearing apparel, and all other articles made wholly or in part of lace or laces, or in imitation of lace; * * * wearing apparel, handkerchiefs, and other articles or fabrics embroidered in any manner by hand or machinery, whether with a plain or fancy letter, initial, or monogram, or otherwise, or tamboured, appliqué, or scalloped, by hand or machinery, or from which threads have been drawn, cut, or punched to produce ornamental openwork, except hemstitching; * * *.

In this form the paragraph passed the Senate and went to conference.

The amendments thus made by the Senate are instructive. There is a perfectly apparent purpose of restoring the scope of the paragraph so that it would not include drawnwork of class 1, but would include that of class 2, thus observing their clear distinction noted in G. A. 6452 and other decisions which conformed with the long-continued customs practice.

In effecting that purpose the Senate struck out the words "or hemstitched," thereby relieving that class of simply constructed goods from this paragraph. What are "hemstitched" fabrics? They are more frequently a class of fabrics with drawn or punched threads, the drawn or punched parts of which have introduced

therein threads of adjustment perfecting and embellishing the same but not *per se* making a figure. By this amendment the Senate struck from the paragraph fabrics named in the paragraph as "hemstitched." This seems an infallible key to the Senatorial purpose. The Senate then proceeded to strike from the paragraph all other language of similar general scope by eliminating the words "or stitched in any manner *for the purpose of ornamentation* or embellishment." *Plainly every ornamented or embellished article or fabric by stitching was not to be included herein.* The Senate then proceeded to add the word "ornamental" before the word "openwork," thereby confining the scope of the "ornamental" test in the paragraph to drawnwork alone.

In this imperfect and indefinite state the paragraph went to conference, from which it emerged and became a law further changed to its present form as and numbered paragraph 349, which in these particulars reads:

349. Laces, lace window curtains, and all other lace articles; handkerchiefs, napkins, wearing apparel, and all other articles made wholly or in part of lace or laces, or in imitation of lace; * * * wearing apparel, handkerchiefs, and all other articles or fabrics embroidered in any manner by hand or machinery, whether with a plain or fancy letter, initial, or monogram, or otherwise, or tamboured, appliqué, or scalloped, by hand or machinery, for any purpose, or from which threads have been drawn, cut, or punched to produce openwork, *ornamented or embroidered in any manner herein described, in any part thereof, however small;* * * *.

As coming from conference we find the paragraph, without infracting the rule of Congress that a conference result must not introduce a new subject of legislation, nevertheless more clearly and aptly expressing a precise purpose. The changes indicating that purpose are very suggestive. The word "ornamental" occurring before openwork was struck out. The words "not hemstitched" added by the Senate after the word "openwork" were likewise struck out. The words substituted were those following "openwork" as follows: "Ornamented or embroidered in any manner herein described, in any part thereof, however small." These words were substituted for "ornamental."

The substituted phrase limits the classes of included ornamentation to those "*in any manner herein described*" which is tambouring, scalloping, appliqué, or embroidery, all *superimposed* by adding an extra thread to form independently or upon the fabric a figure *per se*. The purpose of the Senate and conference to eliminate hemstitched goods from this provision is obvious. If these words do not modify "openwork," the conference defeated this very patent object, for otherwise such goods would fall within the described "openwork." The conference substituted the language for that of similar though more extended effect "ornamental" as a term modifying "openwork" by placing this phrase immediately after that word. It could not

well or grammatically have been otherwise placed and by all the rules of grammar and legal construction should be held to modify "openwork."

If it does modify and limit openwork, only openwork of the classes therewithin are so dutiable. How can it be said after reviewing this precise and studied effort of the Senate and conference to limit the paragraph by *expressly striking out* "ornamental" to say that it meant "ornamental"? There would seem to be no warrant in the statute or its history where Congress expressly struck out "ornamental" as modifying "openwork" and substituted therefor modifying words expressing a limited number of kinds of ornamentation, that Congress meant to include *all* kinds and methods of ornamentation. It may be true that in so doing Congress defeated what otherwise may be *inferred* as its purpose, but in the presence of plain unmistakable language it is for the courts to follow such rather than inferences of a purpose not expressed, but on the contrary negatived by the congressional words. In my view, whatever construction may be put upon other language of the paragraph, whatever transposition may be made of the words of the statute, we must under all rules hold that the words "ornamented or embroidered in any manner herein described" modify "openwork." We can not under any rule deny that modification, and being so unable I can not agree that the phrase includes all kinds of "ornamental" openwork.

UNITED STATES v. NEUSTADTL (No. 1266).¹

1. SUFFICIENCY OF PROTEST.

The only question sought to be raised by the protest was the correctness of the gauger's report on the quantity of beer, and this question was sufficiently indicated.

2. GAUGE OF BEER.

The gauger made no return of actual measurement, but simply a return of the branded capacity of the casks. In doing this he divided the shipments into two lots, corresponding in the number of casks to those named on the invoice and entry, and so entered the two lots as to increase the apparent branded capacity of one and to decrease the other. A computation shows the board reached a result entirely equitable.

United States Court of Customs Appeals, May 18, 1914.

APPEAL from Board of United States General Appraisers, Abstract 32853 (T. D. 33591).
[Affirmed.]

William L. Wemple, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, of counsel), for the United States.

Benno Loewy for appellee.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

This is an appeal from a decision of the Board of General Appraisers directing reliquidation of an entry of beer. The facts as disclosed by

¹ Reported in T. D. 34470 (26 Treas. Dec., 847).

the entry and bill of lading are these: There was shipped by the steamship *President Grant* on the 14th of March, 1912, to the appellee, from Hamburg, a quantity of beer, which beer was covered by two invoices, one covering 330 half barrels of beer and 30 quarter barrels, making a total of 360 casks, containing 20,554 liters, the other invoice covering 130 half barrels, containing 7,799 liters. The entry followed these invoices, naming the two lots, 360 barrels of beer containing 20,554 liters, and 130 barrels, containing 7,799 liters.

The gauger made return as follows:

| Numbers found on— | Capacity, branded liters. |
|-----------------------|---------------------------------|
| 360 barrels beer..... | 21,786 |
| 130 barrels beer..... | 6,837 |

making a total of 28,623 liters, and the course pursued in liquidation was to reduce the separate items to gallons and fix duty upon the quantity supposed to be contained in the 360 barrels on the basis of branded capacity and upon the 130 barrels on the basis of the invoice figures. There is nothing other than the papers to indicate whether the beer as stored under the water line of the vessel was there separated into lots or commingled.

The importer protested the assessment as made, claiming that the goods were liable only to a duty on 7,566 gallons and not that returned by the gauger. It is to be noted that the gauger made no return of actual measurement, but simply a return of the branded capacity of the casks.

The protest was sustained and a reliquidation directed on the basis of a correct computation of the number of gallons contained in the entire shipment as shown by the branded capacity returned by the gauger, which is an increase of 270 liters over the amount stated in the entry.

The Government appeals and two points are raised—first, that the board erred in not holding that the protests were insufficient, and, secondly, in holding that the dutiable quantity was but 7,561½ gallons.

As to the first contention it does not appear that any objection was raised to the protest at the hearing. But assuming the question to be open here, we think the protest was sufficient to raise the question litigated below. The protest was in substance as follows:

We hereby protest against the payment of additional duty of \$57.50 charged erroneously on * * * 490 casks beer imported by Victor Neustadt (Inc.), s/s *President Grant*, Mar. 25, 1912. Entry No. 85646. * * * Claiming that under existing laws said goods are only liable to a duty of 7,566 gals. and not that of gauger's return.

It is obvious that there was no attempt to raise any other question than that the quantity of goods was incorrectly reported by the gauger, and the gauger's return of gallons dutiable was, in so far as

it exceeds 7,566 gallons, excessive, and this question was sufficiently indicated by the protest.

A Treasury regulation promulgated August 2, 1909, and known as T. D. 29929, provides that—

On and after August 15, 1909, duties will be assessed on beer imported in barrels or casks on the basis of the invoice quantity whenever the same is equal to or exceeds the capacity branded on the barrels in liters. Fractions of a liter will not be considered. * * *

If the total invoice quantity is found to be less than the total branded capacity of all the barrels or casks covered by the invoice, the entry will be liquidated upon the quantity shown by the branded capacity.

The contention of the Government is that this regulation treats each separate invoice as a unit, and that where goods are shipped under separate invoices in the same vessel, for the purposes of applying this regulation the goods should be separated into lots designated by the several invoices.

Assuming that this is the correct interpretation of the regulation, it would follow that if the lots covered by each invoice were so separately gauged, there is nothing to impeach the gauger's finding. We do not decide whether, under such circumstances as are here shown, the gauger should have so segregated the two lots and ascertained the quantity. It is apparent that there are difficulties growing out of the practice of the customhouse in the way of his doing so where, as in this case, goods covered by the two separate invoices are commingled, as neither the invoices nor the list of numbers go to the gauger.

But assuming that he should in some way, and as best he may, make such separation in gauging, we now have ample evidence that this was not successfully accomplished in this case. When the case was first submitted the gauger's report was all we had before us to show the character of his work, and as that report did not show the numbers on the casks, there was apparently no means of showing that the particular 360 barrels which showed a greater branded capacity than the entered quantity were those so designated in the entry and in the invoice. But since the hearing of the case the dock books of the gauger have been produced and are now before us, and from these it appears that the gauger did divide the shipments into two lots corresponding in the *number* of casks to those named on the invoice and entry, and it also appears that while the 360-cask lot contained, according to the invoice, 30 quarter barrels, the gauger entered in this lot nothing but half barrels, thus increasing the apparent branded capacity of this lot, while he listed in the 130-cask shipment the entire 30 quarter barrels which belonged in the larger shipment, thus decreasing the apparent branded capacity of this lot correspondingly. A computation of the quantities shown by the branded capacity of the 30 quarter-barrel barrels shows the

amount to be substantially 797 liters. Taking the average capacity of the half-barrel casks as 60 liters, a discrepancy of more than 1,000 liters is accounted for, which, if deducted from the branded liters found by the gauger in the 160 casks which he listed as belonging to the larger lot, leaves a discrepancy in that lot of slightly less than that allowed by the Board of General Appraisers as an addition to the entered quantity. It will be seen from this that the board reached a result entirely equitable to the Government.

It is stated in the brief of Government that this importation is one of those included in the case of *Hollender v. United States* (4 Ct. Cust. Appls., 406; T. D. 33850), and it is claimed that the legal basis of assessment has been completely adjudicated. There is nothing in this record, however, which shows the identity of the issues in the two cases, nor do we think that any legal principle was declared in *Hollender v. United States* which is opposed to the conclusion above stated.

The decision of the Board of General Appraisers is *affirmed*.

UNITED STATES *v.* NOZAKI BROS. 1277).¹

CHARGES AND ENTERED VALUE.

There was nothing before the appraiser at the time of appraisement nor was there anything before the collector at the time of liquidation indicating the character of these items that were allowed as nondutiable. There was no manifest clerical error for correction.—*Thomsen v. United States* (5 Ct. Cust. Appls., —; T. D. 34100).

United States Court of Customs Appeals, May 18, 1914.

APPEAL from Board of United States General Appraisers, Abstract 33927 (T. D. 33816) [Reversed.]

William L. Wemple, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, of counsel), for the United States.

Stanley Jackson for appellees.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

DE VRIES, Judge, delivered the opinion of the court:

This appeal brings up for review a decision of the Board of General Appraisers sustaining a protest alleging clerical error. While the protest does not allege "manifest" clerical error, which is the only clerical error for which relief can be granted under the statute, we assume for the purposes of the consideration of the case the sufficiency of the protest.

The importation was of basket materials of willow imported from Kobe, Japan, and invoiced and destined to St. Louis, Mo. It appears that the several items of the invoice are clearly and correctly set forth. There appears thereupon an item for freight, ocean and inland domestic, which was on entry deducted from the entered value.

¹ Reported in T. D. 34471 (26 Treas. Dec., 850).

Further items upon the invoice are as follows: "Comm. 3% 37.90" yen; "Shipping 46.30" yen; "Insurance 9.44" yen. These items were not deducted upon entry.

The case is submitted upon the papers and the report of the appraiser made in answer to the protest, which states that—

The question is as to relief from certain charges claimed to be nondutiable and included in the entered value of the merchandise. The items claimed are nondutiable and had they been deducted upon entry would not have been added back upon appraisement.

There was, however, nothing before the appraiser at the time of appraisement nor was there anything before the collector at the time of liquidation indicating the character of these items. The character of the items themselves is in no instance noted conclusive of their dutiable or nondutiable character. A commission may or may not be dutiable. The books are replete with cases wherein commissions have been held dutiable or nondutiable according to the character of the service rendered. So shipping charges may or may not be dutiable items. While the word itself is not precisely definitive of the character of the employment, if it occurred in shipping the goods to the principal market place of the country it would be a dutiable item; if afterwards, it would be a nondutiable item. This record does not disclose which of the two is this shipping charge. The bill of lading which was before the collector did disclose that ocean and inland freight in this country were deducted. The inference would be, therefore, that this item was neither such. The same considerations pertain to the item of insurance, which may have been either for the goods while in the warehouse before shipment or during shipment, the former of which would constitute a dutiable and the latter a nondutiable item. It is not possible, therefore, without the aid of extraneous testimony, for the collector or appraiser to say that these items or any of them upon this invoice were or were not dutiable.

Unless the character of the item or the surrounding evidence necessarily before the collector at the time of liquidation disclosed that the item was nondutiable, it would not be a *manifest* clerical error. Nor are we prepared to say that in every case, though its dutiable character was manifest, that the failure to deduct upon entry constituted a *clerical* error. It more likely would be an error of judgment or an error of law upon the part of the entrant. The decisions of this court upon this subject have been so numerous that we deem quotation of them unnecessary. Suffice it to state that in a late decision of the court these were reviewed in the following language:

This court in *United States v. Swedish Produce Co.* (4 Ct. Cust. Appls., 223; T. D. 33437); in *United States v. Wyman & Co.* (4 Ct. Cust. Appls., 264; T. D. 33485); in *United States v. Proctor Co.*, and *Hampton, jr., & Co. v. United States*, decisions of even date with this, has adhered to the language of Congress in declaring that relief in such cases could only be granted where the error was *both clerical and manifest upon the record before the collector at the time of liquidation.*

In *United States v. Swedish Produce Co.*, *supra*, we said:

If relief under said subsection 7 is confined to those cases where the error must appear upon the face of the papers to be sent to and which are before the appraiser and the collector at the time of the appraisement and decision thereupon, respectively, it negatives any fraud upon part of the importer. Second, it gives relief in those cases only which call the attention of the appraising officers to the correct valuation of the merchandise, thereby affording them opportunity at the time of the appraisement and decision thereupon to affix the correct market value of the merchandise. Third, any rule which permits this provision of the statute to be extended to those cases not obviously made apparent by the papers to the eye of the appraiser and collector, and resting the case upon the possibility of proof dehors said record, must put a premium upon fraud or attempted frauds upon the revenues. It is contrary to our understanding of the word "manifest," as used in the common parlance, which requires something obvious or exposed to view.

And in *United States v. Wyman & Co.*, *supra*, we further said:

This statement of the importers' claim clearly shows that the disputed item, even if nondutiable in character, did not result from a manifest clerical error. The item in question was entered in the invoice in the words and figures intended by the writer; they were interpreted by the collector with the meaning and effect which were intended by the writer at the making of the invoice. This statement negatives the occurrence of a merely clerical error. The clerk who prepared the entry may have misunderstood the law relating to such items, he may have misunderstood the facts, or he may have entered the item inadvertently. Nevertheless, clerically the item was not incorrect, for it stood in the invoice in form and substance as the clerk intended to enter it, and the entry correctly carried the intended signification to the mind of the collector. In such case it can not be said that the item was a clerical error, much less can it be said that it was a manifest clerical error. For whatever inaccuracy existed in the entry was the result of inaccurate intention on the accountant's part and not of the clerical execution of that intention.

It would seem, therefore, that the doctrine of manifest clerical error has become *stare decisis*. *Thomsen & Co. v. United States* (5 Ct. Cust. Appls., 69; T. D. 34100).

Reversed.

UNITED STATES *v.* RICE (No. 1278).¹

MANIFEST CLERICAL ERROR—WHAT IS NOT.

There was nothing before the collector at the time of liquidation which would enable him to determine whether or not the item in question should or should not be included within the dutiable value of the merchandise, and in dealing with it there might be an error in judgment committed, but there could be no manifest clerical error.—*United States v. Nozaki Bros.* (5 Ct. Cust. Appls., 286; T. D. 34471).

United States Court of Customs Appeals, May 18, 1914.

APPEAL from Board of United States General Appraisers, Abstract 33927 (T. D. 33816).

[*Reversed.*]

William L. Wemple, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, of counsel), for the United States.

Submitted on record by appellee.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

DE VRIES, Judge, delivered the opinion of the court:

This appeal involves a question of claimed manifest clerical error. The goods were manufactured at Darvel, Scotland, and exported from Glasgow, Scotland, to Boston, Mass.

Upon the invoice is an item entitled "carriage to port paid by shipper amounting to 6s. 8d., and is included in the price of the

¹ Reported in T. D. 34472 (26 Treas. Dec., 852).

goods. These goods were manufactured by us at Darvel." On entry this item was not deducted. The goods were appraised as entered. If this item of carriage is included within the dutiable value of the goods entered and appraised at $3\frac{1}{2}$ pence per yard, these goods are properly dutiable at $2\frac{1}{2}$ cents and 2 cents per square yard. If this charge for carriage to port had been deductible and deducted upon entry this class of goods contained upon the invoice would be properly dutiable at $1\frac{1}{2}$ cents and 1 cent per square yard. Having been included by entry they were held dutiable at the former figure and liquidated accordingly. Subsequently, upon the filing of the protest, the appraiser reported that this was a nondutiable item and that had the same been deducted upon entry the goods would have been appraised at the lower figure. This report, however, was not a part of the record before the collector at the time of liquidation.

The board held this was a manifest clerical error. We are unable to agree that such transactions constitute a manifest clerical error. This court, in an opinion filed herewith, *United States v. Nozaki Bros.* (5 Ct. Cust. Appls., 286; T. D. 34471), and in numerous other decisions of the court recently rendered has clearly defined what constitutes manifest clerical error. In the opinion of the court, such errors as these are errors of judgment in the entrant clerk and not clerical. Moreover, there was nothing before the collector at the time of liquidation which would enable him to determine whether or not the item in question should or should not be included within the dutiable value of the merchandise. If the principal market of the country of exportation for such goods was Glasgow, from which the goods were exported, the item is a dutiable item. If the principal market of the country from which the goods were exported was Darvel the item was a nondutiable item. *Stairs v. Peaslee* (59 U. S., 18 How., 521); *Robertson v. Bradbury* (132 U. S., 491). The proof of this point lies in extraneous evidence. The only evidence before the collector at the time of liquidation was the entry and appraiser's appraisement. The entry was made upon the legal basis and assumption that Glasgow was the principal market of the country of exportation, and the appraisement was made upon that theory. This is a matter exclusively within the jurisdiction of the appraiser to determine and, having so determined, his finding, at least in the absence of an appeal to reappraisement, was final and conclusive upon both the importer and the Government. (*Stairs v. Peaslee, supra.*) So far, therefore, as the collector was advised by the legal record before him at the time of liquidation the item of carriage to port was a dutiable item whether as a part of the actual market value of the goods or as dutiable costs and charges is here unimportant. In either view the error was neither clerical nor manifestly clerical.

Reversed.

UNITED STATES *v.* SCANLAN (No. 1309).¹

REAPPRAISEMENT IN THE ABSENCE OF SAMPLES.

The protest itself shows that the reappraisement by the single general appraiser was made without a sample of the importation or the merchandise before him and there was no waiver of production of samples. The appraisement by the single general appraiser was accordingly invalid and the appraisement of the local appraiser became again operative.

United States Court of Customs Appeals, May 18, 1914.

APPEAL from Board of United States General Appraisers, Abstract 33982 (T. D. 33833).

[Reversed.]

William L. Wemple, Assistant Attorney General (*William A. Robertson*, special attorney, of counsel), for the United States.

Submitted on record by appellee.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MARTIN, Judge, delivered the opinion of the court:

The merchandise involved in this case consists of 583 head of cattle which were imported from Mexico at the port of Brownsville, Tex., under the tariff law of 1909.

The importer invoiced and entered the cattle at a valuation of \$28 per head, Mexican money. Upon appraisement by the local appraiser this valuation was raised to \$30 per head, same currency. The importer thereupon appealed for a reappraisement of the cattle by a single general appraiser. Notwithstanding this appeal, the collector forthwith liquidated the entry at the increased valuation and released the cattle to the importer upon the payment of the increased and additional duties.

Several months later a single general appraiser sat in such appeals at the port of entry and took cognizance of the case. After hearing the testimony of a number of expert witnesses the general appraiser sustained the entered value of the cattle.

The collector of the port appealed from this reappraisement to a re-appraisement by a board of three general appraisers. This appeal was entertained by a reappraising board, but it came at once to the board's attention that the cattle in question had long since been disposed of and that no examination or inspection could be had of any of them, and because of this fact the board held that it had no authority to proceed with the reappraisement. It therefore dismissed the appeal.

Thereupon the collector, acting under the department's instructions, held that the reappraisement made by the single general ap-

¹ Reported in T. D. 34473 (26 Treas. Dec., 854).

praiser was void because of the fact that it also was had without an examination of the cattle or of any samples thereof. The collector also held that the liquidation already made by him was invalid because of the fact that an appeal to reappraisal was pending at the time thereof. Therefore, on November 11, 1912, in accordance with the department's instructions, the collector reliquidated the entry upon the same basis as his first liquidation, except for a correction in the importer's favor relating to the computation of the additional duties and also a miscalculation in the reduction of the Mexican currency to United States currency. Afterwards, on November 25, a second reliquidation was made assessing similar additional duties upon two head of the imported cattle which had not been reported in the invoice or entry.

The importer filed his several protests against these assessments, claiming that the reappraisal made by the single general appraiser was valid and controlling in the premises. In the protests, however, the importer stated that the reappraisal by the single general appraiser "was rendered on the evidence submitted and without a sample of the importation or the merchandise before him."

The protests were submitted upon the record to the Board of General Appraisers and were sustained, from which decision the Government now appeals.

The following extract from the decision sets out the board's reasons therefor:

The papers forwarded by the collector clearly show that he disregarded the reappraisal upon instructions from a superior officer upon the ground that the reappraisal was invalid. The collector, in our judgment, can not in an arbitrary *ex parte* way set aside the solemn finding of a general appraiser. The contention of the collector evidently was, and his superior officer acted upon that contention, that the general appraiser who passed upon the value of the cattle in question did not have samples of the cattle before him. The report of the general appraiser, however, does not disclose the fact that he did not have samples before him, and apparently this is a gratuitous conclusion of the collector. The law presumes that every public official proceeds in the discharge of his duty in accordance with the law, and in the absence of evidence to the contrary his action is presumed to be valid. The report does disclose that the case was appealed to a board of general appraisers and that no samples were before the board and they refused to take action. The protests are therefore sustained and the collector directed to reliquidate the entries, assessing duty upon the value found by the general appraiser, whose decision under section 13, above quoted, is final and conclusive, the Board of General Appraisers refusing to act upon appeal for want of jurisdiction.

It thus appears that the board proceeded upon the theory that the reappraisal made by the single general appraiser would have been invalid if made in the absence of the merchandise or samples thereof, but that the law presumes that every public official proceeds in the discharge of his duty in accordance with the law, and therefore

it should be presumed in this case that the single general appraiser made the reappraisement upon an inspection of the merchandise or lawful samples thereof.

The court is able to agree with the first part of the view taken by the board, but not with the second. It is certainly the settled rule under the tariff act in question that the single general appraiser could not lawfully reappraise an importation upon such an appeal in the total absence of the merchandise and of samples thereof. This rule has been frequently set out in the decisions of this court, of which the following may be cited: *Loeb v. United States* (1 Ct. Cust. Appls., 385; T. D. 31479); *Tilge v. United States* (1 Ct. Cust. Appls., 462; T. D. 31507); *Tilge v. United States* (2 Ct. Cust. Appls., 149; T. D. 31676); *Oelrichs v. United States* (2 Ct. Cust. Appls., 355; T. D. 32091); *Maddaus v. United States* (3 Ct. Cust. Appls., 330; T. D. 32623).

But the court is unable to assume that the single general appraiser had the merchandise or samples thereof before him at the reappraisement in question, since the importer himself in the protests which underlie the present case affirmatively states the contrary to be true. In the protests the importer expressly avers that the reappraisement in question was made by the general appraiser upon evidence, but "without sample of the importation or the merchandise before him." This statement in the protests became part of the record and made it unnecessary for the Government to submit testimony in that behalf at the hearing before the classification board.

It may be noted that the present record does not disclose facts from which a waiver of samples at the reappraisement may be implied. Such a waiver was not claimed by the importer in his protests, nor was the decision of the board founded upon such a finding, and the action of the reappraising board in dismissing the Government's appeal negatives such an implication. It is clear that no such purpose was in the mind of any of the parties to the proceeding, nor was any one of them led in any manner by the other to believe that such a waiver was intended.

It therefore appears of record in the present case that the appraisement made by the single general appraiser upon appeal was invalid. In this contingency the appraisement theretofore made by the local appraiser necessarily became again operative, and the collector was required to adopt that valuation in making his assessment.

It is proper to observe that the real complaint of the importer in the present case relates to the impracticability of retaining the cattle or any of them for the inspection of the single general appraiser upon the appeal. In the statement of his claim in this behalf the

importer refers with approval to the following comments made by the collector in his report upon the case to the department:

Mr. Scanlan appears to base his protest on the fact that the collector did not retain samples at the time the importation was made. In this connection I beg to state that samples of this importation were not retained by the collector for the reason that this importation consisted of range cattle, and a sample thereof in a very short time would be of little or no use to represent the kind of cattle that were imported. For instance, the steers in this importation on the day they were imported would have weighed between 650 and 700 pounds each. Any of these steers that would have been retained by the collector, after having been fed and cared for, would naturally improve in condition and would therefore be of no use as a sample of the importation.

The importer therefore complains that the rule relating to the presence of samples at a reappraisement has been applied by the department in such a manner as virtually to deny him the remedy of an appeal to reappraisement, and this without fault on his part.

In answer to this complaint it should be observed that from an early day it was made the mandatory rule of customs law that a reappraising officer or board should inspect the merchandise in question or samples thereof upon reappraisement, and that a failure to do so, in the absence of waiver, would avoid the reappraisement thus made. It was known that the enforcement of this rule might in exceptional cases deprive either the Government or the importer of the remedy of reappraisement. Nevertheless, this policy was adopted rather than the opposite policy whereby either party might be exposed to the uncertainties attending a reappraisement upon expert testimony in the entire absence of the merchandise or samples thereof. A reappraisement in the absence of samples may indeed be had if both parties waive their production, but not without such a waiver. The following comments of this court in the case of *Tilge v. United States* (2 Ct. Cust. Appls., 149, 158; T. D. 31676) are in point:

The dilemma presented under the law of the goods passing entirely out of the customs custody within the time allowed for the collector to appeal (60 days) presents no novel situation. Prior to August 5, 1909, that time was only limited to what was "reasonable." That it was a situation constantly defeating reappraisement called by collectors at late days and not one presented by any decision of this court is within the knowledge of all familiar with customs practice and witnessed by the decisions of the Supreme Court more than 20 years since. See *Beard v. Porter* (124 U. S., 437).

That presents a matter of legislation which this court did not create and can not remedy, and we assume from its long existence one which the Congress has never deemed of sufficient moment for correction save as it might be affected by the limitation placed upon the time within which the collector may appeal by the act of 1909.

In accordance with the views above expressed, the decision of the board is *reversed*.

UNITED STATES *v.* KRAEMER & Co. *et al.* (No. 1322).¹

JEWELRY—TOYS.

There is nothing in the record to show that the goods of the importation are designed for use as playthings. They are of a size and appearance that leads to the inference they were made to be worn by children as articles of adornment. A commercial designation as toys was not proved. The articles are properly classifiable as jewelry.

United States Court of Customs Appeals, May 18, 1914.

APPEAL from Board of United States General Appraisers, Abstract 34111 (T. D. 33913).

[Reversed.]

William L. Wemple, Assistant Attorney General (*Leland N. Wood*, special attorney, of counsel), for the United States.

Brown & Gerry for appellees.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

The importations in question consisted of brooches or pins made of brass and tin and having an artificial red rose in the center, necklaces constructed of glass beads and cotton strings with a brass clasp, and celluloid bracelets. The pins and bracelets were assessed for duty at 60 per cent ad valorem under paragraph 448 of the act of 1909, as "articles commonly or commercially known as jewelry, or parts thereof, finished or unfinished." The necklaces were assessed at the same rate of duty under paragraph 421 of the same act, which provides for "articles not specially provided for in this section, composed wholly or in chief value of beads or spangles made of glass or paste, gelatin, metal, or other material."

Various claims were made in the protest, but as the evidence in the case lends no support to any claim except that in paragraph 431 for toys, it will be necessary to consider that provision only, as, if the importer is unable to make his case thereunder, he must, under the established rules, be held not to have shown himself entitled to relief.

The board held the importations properly classifiable as toys. In reaching this conclusion, it is apparent that the board was to some extent influenced by previous holdings of the board establishing an arbitrary line of demarcation between goods that should be held toys or otherwise depending upon price. The decision in this case was in part as follows:

As to the brooches, necklaces, and bracelets, numbered, respectively, 1, 2, and 3, the testimony shows that they are known as toy jewelry, toy bracelets, toy necklaces, and are sold to wholesale notion houses as toy jewelry; that they can be bought in five and ten cent stores. In view of this testimony, and the brooches or pins and bracelets being valued at less than seven marks per gross, and the necklaces less than eleven marks per gross, on the authority of G. A. 7251 (T. D. 31786) we hold the merchandise * * * dutiable as toys at 35 per cent ad valorem under paragraph 431.

¹ Reported in T. D. 34474 (26 Treas. Dec., 858).

We are of the opinion that quite other tests must be applied than that of value. The article may be cheap and yet not a plaything. And this view has since been adopted by the board. See Abstract 32185 (T. D. 33963). Use generally is a controlling consideration. See *Ilfelder v. United States* (1 Ct. Cust. Appls., 100; T. D. 31115). The present case is devoid of evidence showing that the articles in question are used as toys. An inspection shows that they are adapted to use as articles of children's adornment, cheap it is true, their use doubtless confined to people of limited means, yet nevertheless in their use filling the place for those who use them of more valuable jewelry.

The proof of commercial designation is not convincing. It is true that witnesses testify that these articles are known to the trade as toy jewelry, but the record also shows that this term is not universally applied. The first answer given by the witness Adler, who had an experience of four years carrying back to a time shortly before the enactment of the tariff act, was as follows:

A. The brooches and necklaces are known as toy jewelry, and the bracelets as toy bracelets. They all come under the class of jewelry, and are known as common jewelry novelties really.

On cross-examination he was asked:

Q. And do I understand that you use the term novelty jewelry?—A. Those brooches are sold mostly as novelties.

Q. And are they catalogued as novelties?—A. We don't carry a catalogue, and I really don't know.

This testimony tends very strongly to show that the term "toy jewelry" is not a term indicating the real use, and that it is not employed exclusively in describing these goods.

It is said in the brief of the appellee that—

The mere fact that sometimes the articles may be known without the adjectival word "toy" is not sufficient reason to change their classification. A top or a kite is a toy and belongs to the general class of toys, even though it may be known under its specific name, and even though there may be gyroscopes or kites which are used by adults in war or for scientific purposes. An examination of the samples in this case is sufficient to indicate that they are suitable for no serious purpose whatever, either for the use of adults or children.

This statement we could readily follow if we were to accept the premises of the importers' counsel. But there is nothing in this record to show that these articles are designed for use as playthings. Were they adapted to use as doll's jewelry a different question would be presented; but they are not. They are of the size and appearance which leads to the inference that they were designed to be worn by children as is any other article of adornment, and in the absence of convincing evidence of exclusive commercial designation, we feel constrained to hold that these articles were properly classified.

The decision of the board is *reversed*.

ALTMAN & Co. v. UNITED STATES (No. 1328).¹

LACE PINS OR SHAWL PINS—WHEN NOT JEWELRY.

These lace pins or shawl pins, with fancy heads and steel shafts, gold plated, according to the testimony, are not known as jewelry and are not used for purposes of adornment. On the authority of cases cited the goods are held not to be jewelry.—*United States v. Flory* (4 Ct. Cust. Appls., 87; T. D. 33367) distinguished.

United States Court of Customs Appeals, May 18, 1914.

APPEAL from Board of United States General Appraisers, Abstract 34052 (T. D. 33872).

[Reversed.]

Brown & Gerry for appellants.

William L. Wemple, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, of counsel), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

The merchandise in question in this case consists of lace pins with gold-plated steel shafts and paste heads in colors pink, blue, green, mauve, and white. Samples of the white pins only are produced, which bear somewhat the appearance of small imitation pearls, but the colored pins are not produced. The pins are all valued at less than 20 cents per dozen. They were assessed for duty as jewelry under paragraph 448 of the tariff act of 1909 and are claimed to be dutiable at 45 per cent ad valorem as manufactures of metal. The board overruled the protest on the authority of *United States v. Flory* (4 Ct. Cust. Appls., 87; T. D. 33367).

The testimony in the case was that of an employee of the importer who testified that he was buyer in the notions department and that he purchased the goods in question; that the pins are known in the trade as lace pins or shawl pins; that he has never known them to be called jewelry; that he is not himself connected with the jewelry department; that he makes the purchases from a firm furnishing these pins to the importers and that he did not think the jewelry department buys from this party at all. The return of the appraiser is that the merchandise consists of lace pins with fancy heads and steel shafts, gold plated. This presents the only testimony in the case.

The board was of the opinion that there was nothing in the testimony to overcome the presumption of correctness which attached to the collector's classification, and held that the goods were used as and for jewelry and come under the rule enunciated in *United States v. Flory*. It becomes necessary to consider, therefore, just what was decided in *United States v. Flory*.

¹ Reported in T. D. 34475 (26 Treas. Dec., 860).

The articles there in question were pins with solid heads. The goods were fully gold plated and made in imitation of one of the precious metals. It was said:

They are complete in themselves and have an individuality of their own which distinguishes them from the attire or wearing apparel to which they may be attached. They are valuable to the consumer rather because of their ornamental character than by reason of their utility, and are clearly designed to be used as articles of personal adornment. In fact, except that they are somewhat smaller, there is nothing to distinguish the so-called lace pins from scarfpins or stick pins, and there is nothing about them which would lead the casual observer to believe that they are anything other than what they seem to be, namely, articles of gold designed to be worn on the apparel as an ornament.

It was further said:

It is true, as contended by counsel for the appellants, that there are hat, shawl, belt, toilet, and lace pins which are not commonly known as jewelry, and that the Board of General Appraisers as well as the courts have so declared (citing various cases to which reference will be had later).

* * * The pins which were held by the board and the courts not to be commonly known as jewelry performed the office of mere pins, and in truth did not materially differ from the ordinary metal pins of commerce. They had longer shanks and larger heads than the ordinary pins, and the heads appear to have been composed not of metal, but either of imitation round or baroque pearls or of plain wax, paste, or glass colored to harmonize with the apparel to which they were attached. These variations from the common pin seem to have been inspired, however, not by the purpose of converting the articles into ornaments, but rather by the necessity of meeting special conditions arising from the thickness or the thinness of the materials to be pinned, and by the demands of good taste, which required that such pins should serve their utilitarian purpose without being unduly conspicuous.

It is clear that articles of this character were not intended to be covered by the decision in *United States v. Flory*.

The case cited by the Government, of *United States v. Strauss & Co.* (4 Ct. Cust. Appls., 386; T. D. 33797), adds nothing to the force of the *Flory* case as an authority for the Government, for in that case no sample being produced, it was asserted by the Government in its brief that the articles consisted of gold-plated lace pins classified as jewelry at 60 per cent ad valorem under paragraph 448 of the tariff act of 1909 and that the decision below was contrary to *United States v. Flory*, "which is identical with the present case." This was assumed by the court to be a correct statement of the facts, and we still have no reason to question that it correctly stated the facts. This being so, it furnishes no extension of the rule in the *Flory* case.

The *Flory* case did not overrule in any way the cases to which it referred which had dealt with pins designed not for use distinctively as articles of adornment, but rather to meet the necessity of meeting special conditions which required that they should serve a utilitarian purpose without being unduly conspicuous.

The cases which among others the court cites in *United States v. Flory* are T. D. 26679 and T. D. 26492, which apparently note the distinction between such pins as are here in question and those involved in the *Flory* case.

In T. D. 25213 the pins in question were small gilt pins with glass heads of various colors, including imitations of pearls, used to secure veils to hats and to fasten collars, belts, etc., known as lace pins, belt pins, and by other names, designed to serve the same purposes as the common and ordinary solid head or all-metal pins of commerce, utility rather than ornament being the primary intent of their employment. The pins ranged from seven-eighths of an inch to $1\frac{1}{4}$ inches in length. It was found that these pins were not commonly known as jewelry. A description of these pins corresponds almost precisely with the description of those involved in the present case. A distinction was made in the case between such pins and larger pins devoted to other purposes. The same distinction was noted in T. D. 26679, where the pins corresponding to those here in question were held not to be dutiable as jewelry, and again in Abstract 15614 (T. D. 28223).

We think on the authority of these cases that such pins as those here in question should not be held to be articles commonly known as jewelry, particularly in view of the testimony offered by the importers in this case.

The decision of the board is *reversed*.

UNITED STATES *v.* GREDELUE (No. 1336).¹

BOWL OF BLOWN GLASS WITH STEM AND FOOT MOLDED.

This glassware is composed of blown bowls with molded stems and feet. There was no evidence by which a finding could be made of the value of the blown bowl or that of the molded stem and foot when these first took on the character of blown or molded glass; and the finding of the collector that blown glass was the component material of chief value was unimpeached.

United States Court of Customs Appeals, May 18, 1914.

APPEAL from Board of United States General Appraisers, G. A. 7519 (T. D. 34023).

[Reversed.]

William L. Wemple, Assistant Attorney General (*Leland N. Wood*, special attorney, of counsel), for the United States.

Comstock & Washburn for appellee.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

SMITH, Judge, delivered the opinion of the court:

Plain stem glassware, imported at the port of New York, was classified by the collector of customs as glassware composed wholly or in

¹ Reported in T. D. 34476 (26 Treas. Dec., 862).

chief value of blown glass and assessed for duty at 60 per cent ad valorem under the provisions of paragraph 98 of the tariff act of 1909, which paragraph, in part, reads as follows:

98. * * * All articles of every description, including bottles and bottle glassware, composed wholly or in chief value of glass blown either in a mold or otherwise; all of the foregoing, not specially provided for in this section, * * * sixty per centum ad valorem; * * *.

The importer protested that the goods were manufactures wholly or in chief value of glass or paste and that they were not dutiable at 60 per cent ad valorem, but at 45 per cent ad valorem under the provisions of paragraph 109 of said act, which paragraph in so far as pertinent reads as follows:

109. * * * All glass or manufactures of glass or paste or of which glass or paste is the component material of chief value, not specially provided for in this section, forty-five per centum ad valorem.

The Board of General Appraisers sustained the protest. Subsequently a rehearing was granted and after a retrial of the issues the protest was again sustained. The Government appealed.

The merchandise in question, as appears from the samples and the evidence adduced at the hearing before the board, consists of a variety of water, wine, and cocktail glasses, having a stem and foot of molded glass and a bowl of blown glass. As appears from the record, the wares are manufactured in France and are made from glass of the same grade, kind, and quality.

The blowing of a quantity of molten glass in a mold is the first step in the process of manufacture and results in producing an amphora-shaped vessel, topped by a boss of glass, which is subsequently "cracked off" or removed in order to produce a perfect bowl. While the boss-topped bowl is still hot a piece of molten glass is attached by another operator to the bottom and drawn and molded by him into a stem. To the stem is then stuck an additional piece of molten glass, which is fashioned by still another workman into the foot upon which the glass is intended to stand when completed. On the original hearing before the board, A. Gredelue, the importer, testified in his own behalf that the blowing of the bowl requires no particular skill and that the man employed for that purpose receives 25 per cent less than the skilled artisan who makes the stem and 40 per cent less than the skilled artisan who makes the foot. He fixed the value of a finished stemmed water glass or goblet at 45 centimes, 15 centimes of which represented the value of the finished bowl, 15 centimes the value of the finished stem, and 15 centimes the value of the finished foot. He stated that the value of the bowl of the goblet was one-third and the value of the stem and foot two-thirds of the value of the completed article;

which proportionate values he claimed were applicable to all other exhibits in the case. He further declared that the value of a water glass without a stem or foot and having the same capacity as the goblet would be about 15 centimes. From the testimony of this witness and that of other witnesses it appears that after the bowl is blown and the stem and foot are molded the article in its assembled form is submitted to other manufacturing processes, and that the values stated were the values of the completed product and of its constituent parts just as they appeared in the exhibits. Gredelue declined to state either the cost of the labor or the cost of the material employed in making the bowl, the stem, or the foot, and based his refusal on the ground that to do so would result in divulging a trade secret and on the further ground that he had no authority from the manufacturing company to furnish detailed information as to the cost of manufacture.

The board found that the glassware under consideration was composed of a bowl of blown glass and a stem and foot of molded glass, and that the value of the molded glass exceeded the value of the blown glass. We think that the finding of the board as to the composition of the merchandise was correct, but that there was no evidence upon which it could base any finding as to the value of the blown bowl or of the molded stem and foot. The testimony of the witnesses who testified on the subject was not directed to the value of the bowl immediately after it had been blown or to the value of the stem and foot immediately after those components of the glassware had been molded. The values stated were the values of the bowl, stem, and foot just as they stood in the completed article and not their values immediately after they had taken on the character either of a blown bowl or of a molded stem or foot. In order to determine the component of chief value, the value of the bowl should have been taken as of the time when it became blown glass, and the value of the stem and foot as of the time when they were given their form by molding. Once the bowl was blown and the stem and foot were fashioned, the cost of further processing was chargeable to the whole article and not to its parts. As there is no evidence from which the cost of such further processing can be determined and subtracted in the proper proportion from the values of the bowl, stem, and foot as they appear in the exhibits, we are unable to say what was their value when they first took on the character of blown or molded glass.

The finding of the collector that blown glass was the component material of chief value is therefore not impeached, and from that it follows that the decision of the Board of General Appraisers must be *reversed*.

FISCHER v. UNITED STATES (No. 1339).¹

STRINGS FOR MUSICAL INSTRUMENTS.

"Strings for musical instruments" refers to strings used for the production of musical sounds; and the tailpiece gut of one of the two classes of importations are not so employed. As to the catgut of the other class of importations there is no dispute that when used as a part of an instrument they are used for the purpose of producing musical sounds. They are "strings for musical instruments" and were dutiable as such.

United States Court of Customs Appeals, May 18, 1914.

APPEAL from Board of United States General Appraisers, Abstract 34317 (T. D. 34026).

[Modified.]

Brown & Gerry for appellant.

William L. Wemple, Assistant Attorney General (*Leland N. Wood*, special attorney, of counsel), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

BARBER, Judge, delivered the opinion of the court:

The protests in this case relate to catgut strings, which the evidence shows without dispute may be divided into two classes, and they have been so treated in the arguments.

The first class, that covered by protest No. 619667, is represented by two exhibits, each consisting of a coiled colored string. These exhibits are very like in all respects except that one has a greater diameter than the other. The evidence shows that short pieces of the one having the smaller diameter are used to hold the tailpiece of a violin to the end pin of that instrument while similar pieces of the one having the larger diameter perform a like function upon a cello. An illustrative exhibit, in connection with the evidence, shows that these pieces are applied and adjusted to the respective instruments in the following manner: A piece some 5 or 6 inches in length is cut from the proper coil, its ends inserted or drawn through holes in the tailpiece prepared to receive them, and then heated and fastened together with smaller pieces of catgut. The resulting loop is placed around the end pin of the instrument of which the tailpiece is a part. These small pieces of catgut are subjected to no other operations in adjusting them to the instruments. Almost any other catgut strings could be used for the same purpose provided they were of suitable size and had the requisite tensile strength, which is considerable. The evidence shows that the strings in question when so adjusted do not produce any musical tones and, further, that strings of this class are not used in the production of such tones upon musical instruments.

The second class of merchandise, that covered by protest No. 636279, as shown by the evidence and exhibits, of which there are also

¹ Reported in T. D. 34477 (26 Treas. Dec., 865).

two, is conceded to be strings of the proper length and designed for use in the production of musical tones upon certain musical instruments which are described in the importer's evidence as double bass and which are larger than cellos.

Only two witnesses were called in the case, one the importer, who testified in his own behalf, and the other an importer and dealer in musical instruments, who testified on behalf of the Government. Each of these witnesses appears to have been qualified to testify on the subject to which his evidence was directed.

The importer testified that the strings composing this second class were designed to be spun or wound before being used as strings for musical instruments, although as a matter of fact they were not always wound before being so used; that in some instances before being wound they were smoothed, and that if used upon the instruments without being wound it was necessary to smooth and oil them; that he did not believe unless they were either wound or smoothed, as the case might be, they could be used for producing musical sounds, although he could not say positively they were not suitable for such use in the condition in which they were imported; that in expressing his opinion that they were not suitable he had reference to the higher class of such instruments.

The Government's witness testified that he imported, handled, and sold strings identical in all respects, so far as he could see from an examination thereof, with this class of importations; that in his opinion the strings of this second class were, in the condition as imported, ready to be used on musical instruments; that they were sometimes wound and sometimes not, according to the kind of instrument upon which they were to be used; that oiling had no effect upon the tone produced, but in his opinion was mainly for purposes of preservation.

Both classes of this merchandise were assessed for duty as strings for musical instruments at 45 per cent ad valorem under paragraph 467 of the act of 1909, the material part of which provides for—

Musical instruments or parts thereof; * * * strings for musical instruments, not otherwise enumerated in this section. * * *

The Board of General Appraisers affirmed this assessment, and in a brief opinion, among other things, said:

The evidence discloses that the merchandise in its imported condition is strings for musical instruments and can be used as such.

The appellant contends that in thus construing the paragraph as covering the first class of strings here the board erred, and claims that the term "strings for musical instruments" therein employed relates only to such as are used in producing musical sounds. We are cited to no judicial or other determination of this question and know of none. In our opinion, however, the expression "strings for

musical instruments" refers only to strings used therein for the production of musical sounds; and it follows from what already appears that the first class of the importations here are not such strings.

The Government, however, contends that nevertheless these strings are *parts of musical instruments* within the meaning of the paragraph and that, therefore, the judgment of the board should be upheld with respect to said first class.

The importer claims that such strings are dutiable at 25 per cent ad valorem as manufactures of catgut not specially provided for under paragraph 462 of the same act, and we think this claim should be upheld.

These colored catgut strings, although they are, so far as the evidence in this case goes, shown to be used as above indicated, are nevertheless manifestly susceptible of any of the various uses to which catgut strings of their respective sizes may be applied, and there is nothing about the strings which indicates that they have been devoted to or set apart for use in the construction of musical instruments. They are not, as claimed by the Government, within the reasoning of this court in the case of *United States v. Lyon & Healy* (4 Ct. Cust. Appls., 438), relating to certain parts, such as violin and cello necks cut into shape for use therein, but not entirely finished, and which were held parts of musical instruments because their shape and condition indicated *per se* their ultimate use. They are rather like certain cylindrical forms of wood or ivory involved in that case, the condition of which did not indicate that they were intended to be used as parts of musical instruments or that they were unfitted for use for other purposes and which were held not to be dutiable under the paragraph as parts of musical instruments. See also *Richard v. United States* (4 Ct. Cust. Appls., 470; T. D. 33883).

As to the second class of the merchandise it appears from the testimony above recited, which is substantially all that is relevant to the question, that the evidence is conflicting as to whether this class is or is not, in the condition imported, ready for use upon stringed instruments. There is, however, no dispute that these strings are used, when a part of the instruments, for the purpose of producing musical sounds. The importer claims they are free of duty as catgut unmanufactured under paragraph 529 of the act of 1909.

In *Richard v. United States* (3 Ct. Cust. Appls., 306; T. D. 32587) a like claim was made as to somewhat similar merchandise. The various statutes relating to catgut were reviewed in that case, and the conclusion reached that catgut strings for musical instruments imported in a condition fit for immediate use thereon were not entitled to free entry.

In the case now before us the board has found that in the condition as imported these strings are strings for musical instruments and can

be used as such. We think the evidence in the record in connection with the exhibits warrants the finding and that the claim for free entry ought to be denied.

The result is that as to the catgut strings involved in protest 636379 the judgment of the Board of General Appraisers is *affirmed*, while as to that covered by protest 619667 its judgment is *reversed*, and it is held that the merchandise covered thereby is dutiable as a manufacture of catgut at 25 per cent ad valorem under paragraph 462, as claimed by the importer.

Modified.

UNITED STATES *v.* VEITH (No. 1357).¹

BUTTONS IN CHIEF VALUE OF PASTE.

There has been a legislative recognition that for tariff purposes there is a difference between *pasté* and glass. The buttons here are manufactures of paste, but they are not classifiable as manufactures in view of the more specific and applicable language appearing in paragraph 427, tariff act of 1909, and they were properly dutiable under that paragraph.

United States Court of Customs Appeals, May 18, 1914.

Appeal from Board of United States General Appraisers, G. A. 7539 (T. D. 34245).

[Reversed.]

William L. Wemple, Assistant Attorney General (*William A. Robertson*, special attorney, of counsel), for the United States.

Brooks & Brooks for appellee.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

BARBER, Judge, delivered the opinion of the court: •

The undisputed evidence shows that the merchandise in this case is buttons of which paste is the component material of chief value. They were assessed for duty under paragraph 427 of the act of 1909 as glass buttons at three-fourths of 1 cent per line per gross and 15 per cent ad valorem. The importers claim they are dutiable at 45 per cent ad valorem under paragraph 109 as manufactures in chief value of paste or at 50 per cent ad valorem as buttons not specially provided for in the last part of paragraph 427. The board sustained the claim first mentioned. The Government appeals, claiming, if the question were a new one, that the classification of the collector ought to be affirmed, although it concedes, in view of the adjudications hereinafter referred to, that such a holding might be of doubtful propriety. It insists, however, that in any event the merchandise must be held dutiable as set forth in the importers' claim secondly above mentioned. The importers urge that the judgment of the board should be upheld, but if not, agree with the Government that the merchandise is dutiable as buttons not specially provided for.

¹ Reported in T. D. 34478 (26 Treas. Dec., 868).

The material part of paragraph 427 provides for a line measure of three-fourths of 1 cent per line per gross for buttons of glass not specially provided for in the section, with an additional ad valorem rate of 15 per cent, and for "buttons not specially provided for in this section" a duty of 50 per cent ad valorem.

Paragraph 109 provides for—

* * * All glass or manufactures of glass or paste or of which glass or paste is the component material of chief value, not specially provided for in this section, forty-five per centum ad valorem.

In *United States v. Marshall Field & Co.* (85 Fed., 862), decided in 1898, buttons composed in chief value of paste were held dutiable under paragraph 351 of the act of 1894, which so far as material to the issue there involved related to manufactures of paste or of which paste was the component material of chief value. Paragraph 317 of the same act, which was the competing paragraph in that case, provided, so far as relevant to the issue, for "buttons of glass" and did not contain the proviso found in said paragraph 427 for "buttons not specially provided for." Under the law then in force and in view of the facts no other conclusion could properly have been reached in that case.

In *Blumenthal v. United States* (144 Fed., 384), decided in the Circuit Court of Appeals for the Second Circuit in 1905, buttons of metal and paste known as "rhinestone buttons," paste being the material of chief value, were under consideration. It appears from the decision of the board, which was copied in the opinion of the court, that the merchandise involved several protests and had been assessed under different paragraphs. The board stated the issue litigated before it in the following language:

The sole question for decision would resolve itself into an inquiry as to whether buttons made in chief value of paste are to be classified as manufactures of paste or as glass buttons.

The importer in that case contended that as paste was a species of glass the provision for buttons of glass found in paragraph 414 of the act of 1897 was more specific than that for manufactures of paste found in paragraph 112 of the same act.

In an able discussion of the entire question, and upon a review of the legislative history and the judicial interpretations of the statutes involved, the board, by Somerville, General Appraiser, held, that, although paste was a kind of glass, Congress had nevertheless differentiated between the two; that buttons of which paste was the component material of chief value were not buttons of glass within the meaning of paragraph 414; and that inasmuch as paste buttons were not provided for *eo nomine* in that paragraph the buttons before it

were relegated to paragraph 112 for the assessment of duty. The board further said—

It is unnecessary to consider whether the articles are dutiable as manufactures of paste under said paragraph 112 or under the last clause of said paragraph 414 as "buttons not specially provided for," because no such question is presented by the protest.

The Circuit Court of Appeals, upon the opinion of the board and by a *per curiam* decision, without discussion, affirmed the judgment of the Circuit Court which had sustained the board.

In the case at bar the board relied upon the two cases above referred to as authority for its holding that these buttons, of which paste is the component material of chief value, are dutiable under paragraph 109 rather than under paragraph 427, and they well say that paragraph 109 is identical with paragraph 112 of the act of 1897, involved in the Blumenthal case above referred to. It is also true that paragraph 414 of the act of 1897 is identical, so far as relevant to the issues here, with paragraph 427 of the act of 1909.

We are of opinion that the subsequent reenactment of these paragraphs of the act of 1897 in those under consideration here in the act of 1909 should, in view of the conclusion reached in the Blumenthal case, be held to be a legislative recognition and affirmance of the proposition that Congress has designedly differentiated between paste and glass for tariff purposes. In the Blumenthal case, however, there was no determination of the question as to whether buttons of which paste was the component material of chief value were dutiable as manufactures of paste or as buttons not specially provided for.

Paragraph 427 of the act of 1909 expressly refers to buttons known commercially as agate buttons, metal trousers buttons (except steel), and nickel bar buttons, buttons of bone, buttons of pearl or shell, buttons of horn, vegetable ivory, glass, or metal, shoe buttons made of paper, board, papier-mâché, pulp, or other similar material, and certain buttons of metal, and upon which specific and ad valorem rates or ad valorem rates only of duty are fixed, but it will be noticed that buttons of paste are not included therein. Near its close the paragraph refers to "buttons not specially provided for in this section, and all collar or cuff buttons and studs composed wholly of bone, mother-of-pearl, or ivory," on which an ad valorem rate of 50 per cent is assessed.

We think the structure and language of this paragraph clearly indicate that thereby it is designed to fix the rates of duty upon buttons generally and by the term "buttons not specially provided for" to make provision for buttons of *whatever material composed* if they are not elsewhere provided for in the paragraph or in the statute. Now, the merchandise here is not glass buttons, but is buttons nevertheless. The not-specially-provided-for provision being in both the competing paragraphs, their comparative specificity is to be deter-

mined as if it had been omitted. *Newman-Andrew Co. v. United States* (2 Ct. Cust. Appls., 4; T. D. 31570).

So considered, we have manufactures of paste to compare with buttons of whatever material composed, which of course includes paste, and so regarding the issue we think there is no question that the term "buttons" is the more specific. The term "manufactures" is very broad and comprehensive, while the term "buttons" is narrow and exactly describes the merchandise here. Doubtless the Board of General Appraisers overlooked the fact that in the *Blumenthal* case the issue here presented was expressly excluded from consideration.

The merchandise is held to be dutiable at 50 per cent ad valorem under the last part of paragraph 427, and the judgment of the Board of General Appraisers *reversed*.

UNITED STATES *v.* MASSON (No. 1366).¹

"REGULAR" CARTAGE RATES IN PORTS.

A flat rate agreed on by the Government for drayage charges is not conclusive against an importer. His liability is for the payment of the regular rate for service of the sort at the same time and place. *United States v. Masson* (4 Ct. Cust. Appls., 363; T. D. 33534.) On the present record the proof, while not conclusive, is sufficient to support the board's decision that the regular rate at the port of Baltimore for services of the kind in issue was 6 cents and not 18 cents.

United States Court of Customs Appeals, May 18, 1914.

APPEAL from Board of United States General Appraisers, Abstract 34860 (T. D. 34201).

[Affirmed.]

William L. Wemple, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, of counsel), for the United States.

Submitted on record by appellee.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MARTIN, Judge, delivered the opinion of the court:

The present issue relates to certain charges for cartage which were assessed by the collector upon certain unclaimed cases of safety matches at the port of Baltimore. The importations were made in lots of about 50 cases, each case weighing between 240 and 300 pounds. These were carted from the Philadelphia dock to the public stores, a distance of about six blocks, and were there held until they were duly entered for consumption.

Upon liquidation the collector assessed the merchandise with 18 cents per case for cartage, 15 cents per case per month for storage, and 15 cents per case for labor.

¹ Reported in T. D. 34479 (26 Treas. Dec., 871).

The importer duly filed his protest against these assessments, claiming that they were more than the regular rates for such services at the time in Baltimore.

The protest was submitted upon evidence to the Board of General Appraisers. The board overruled the claim of the protestant as to the charges for storage and labor, and no appeal was taken by the importer from that ruling. As to the assessment of 18 cents per case for cartage the board held on the evidence that 6 cents per case was the regular rate at the port of Baltimore for such services, and sustained the protest to that effect. The Government now appeals from this decision.

The foregoing recital immediately directs attention to the case of *United States v. Masson* (4 Ct. Cust. Appls., 363; T. D. 33534), wherein a similar issue raised by the same importer, relating to the same charges for identical services, was decided by this court. The testimony heard in that case has not, however, been incorporated in the present record. The present issue must therefore be decided upon the present record alone, in the light, however, of the general principles which were formulated in the decision of the former case.

It is settled that such charges as those now in question must not exceed in any case "the regular rates for such objects at the port in question." (Sec. 2965, Rev. Stat.) Therefore the primary question at present is whether 18 cents per case was the "regular rate" for carting such merchandise from the dock to the stores at Baltimore at the time of these transactions. It appears from the record that the Government actually paid the sum of 18 cents per case for the cartage in question. This was done in performance of a contract whereby the Government bound itself to pay 18 cents per case flat rate for the cartage of all unclaimed packages of merchandise at Baltimore, regardless of the size or weight of the individual packages, or of the different distances which they were severally carted. Under the rule laid down by this court in the *Masson* case, *supra*, such a flat rate is not conclusive upon the importer, and he is not obliged to pay the same if it be in excess of the regular rate for such services at the same time and place.

The present record contains conflicting evidence as to the regular rate for such cartage prevailing in Baltimore at the time in question.

The importer, Mr. Masson, who is engaged in the business of importing safety matches at the port of Baltimore, testified that the Ericsson Transfer Co. virtually had all the hauling of goods from the dock in question, and that they had always carted such cases for him over that route at a charge of 6 cents per case; that other draymen had hauled similar packages for him a distance somewhat exceeding this at a charge of 8 or 9 cents per case.

Mr. Briddell, a witness called by the importer, is the president of the Briddell Transfer Co. at Baltimore, and testified that he had

quoted 6 cents a case to Mr. Masson for identical hauling; that this was no special rate; that he had hauled such cases greater distances for 9 cents, although 10 cents would have been a fair rate. The following extracts are quoted from the testimony of this witness:

Q. Then, you were making a rate that you thought would pay for the hauling of Mr. Masson's matches?—A. Yes.

Q. And that rate was not based upon a prevailing uniform rate at the B. & O.?—A. We are obliged when we quote prices, perhaps, like everybody else we make all the profit that we reasonably can, but we are confined by our competitors—we have to quote prices in line in order to get business.

Q. Then, when you quoted a price you did not quote a price that was generally prevalent and well known at the port of Baltimore?—A. In quoting prices I have to be posted as to what is the general price.

* * * * *
Q. Then, Mr. Briddell, you did not quote a regular rate, but you quote a rate that you think will get the business?—A. I quote as high a rate as I think my competitors will permit me to get the business.

The foregoing testimony tends to sustain the claim of the importer, since it tends to show that 6 cents per case was a price which admitted of some profit, and which was as high as the transfer company could obtain in view of the general competition for such business at the port.

On the other hand, Mr. Haines, a witness called by the Government, is also in the transfer business in Baltimore, and testified that 6 cents per case was not the regular rate for such cartage in that city; that there really was no "regular rate" for such hauling in Baltimore, but that 15 cents per case would be a fair price for the same.

In addition to the testimony of these witnesses it appears that the Government near the time of these transactions called for written bids from various transfer companies in Baltimore for the hauling of unclaimed merchandise at that port. The bidders were required to distinguish between different distances and routes of carriage, but again the bids were to be flat-rate only in respect to the size and weight of the several packages. The Government received a number of written bids in answer to this request, and in every case the flat-rate charge for hauling packages over the route now in question was more than 18 cents apiece. In each written bid it was certified by the bidder that the price named therein did not exceed the usual commercial rates for such services at the port of Baltimore. This fact is offered by the Government as proof that the regular rate for the cartage in question was actually more than the Government's charge in the present instance. These bids, however, are open in part to the objections stated in the Masson case, *supra*, since they do not particularize the charge for packages of the size and weight of those now in question. Neither do they tend to show that an average or flat rate is ordinarily the "regular rate" for hauling merchandise at Baltimore, since the bids simply responded in that particular to the terms prescribed in the request of the Government. It is true

that Mr. Veazy, the Government auditor at the Baltimore custom-house, testifies that "the idea was that while we could not meet the question of a flat rate of different kinds of merchandise, we endeavored to meet it for the routes and distances, and we asked for a separate proposal on each one of these 10 routes." No explanation, however, is given to show just what the witness means by his statement that the Government "could not meet the question of a flat rate of different kinds of merchandise." So far as appears from the record the transfer companies had not refused to bid for the work upon a basis of the size and weight of the several packages as well as the distances of carriage. Indeed, the testimony rather implies that the flat-rate bid was unusual at that port. This is illustrated by the testimony of the witness Briddell, who had filed a flat-rate bid in answer to the Government's request. In reference to this bid he stated as follows:

Q. You mean to say that if you had your bid accepted your hauling of these loads to general-order store would have been within that contract?—A. I mean to say there is no rate quoted; there is a combination; it is a three years' contract. I would have all the business for three years for the Government for unclaimed packages.

Q. Suppose you had to haul a binder under that?—A. I would have to handle it for 25 cents.

Q. Suppose it was a hand organ?—A. If it was a spool of cotton it would be 25 cents.

* * * * *

By General Appraiser McCLELLAND: Would it be practicable to make such a bid as you have there made except upon a sort of general average basis?—A. That is the only way, on a general average basis. A man must be somewhat familiar with the class of goods handled by the Government.

By Mr. McNABB: Did you or did you not know in this bid that the rates that you bid were not in excess of the usual commercial rate prevailing at the port of Baltimore?—A. I did, but that covers a certain amount of risk.

The foregoing testimony related to the flat-rate bid which the witness had filed in answer to the Government's request for bids as above explained, and the witness evidently meant that such a flat-rate bid could only be made upon a "general average basis," requiring a knowledge of the class of goods handled by the Government. Such a statement does not imply that the average or flat-rate bid was the only or even the usual form of bid for such work at the port of Baltimore.

Upon the present record the board found in favor of the importer's claim for 6 cents as the regular rate for such cartage at Baltimore at the time of the service in question, and upon a consideration of the somewhat meager and conflicting evidence in the case that decision appears to be supported by a measure of proof sufficient to sustain it upon appeal. The decision is therefore *affirmed*.

DE VRIES, Judge: For the reasons set forth in the dissenting opinion in *United States v. Masson* (4 Ct. Cust. Appls., 363-367; T. D. 33534) I dissent in this case.

ABRAHAM & STRAUS *et al.* v. UNITED STATES (No. 13000), 211

SUFFICIENCY OF THE RECORD.

There was sufficient in the appraiser's reports or the collector's letters, taken together, upon which to predicate a finding of fact and so to bring the particular statute into operation.—*Vandegrift v. United States* (3 Ct. Cust. Appls., 219; T. D. 32535).

United States Court of Customs Appeals, May 28, 1914.

APPEALS from Board of United States General Appraisers, Abstract 33837 (T. D. 33788), and Abstract 33858 (T. D. 33795).

[Remanded.]

Comstock & Washburn for appellants.

William L. Wemple, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, of counsel), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

DE VRIES, Judge, delivered the opinion of the court:

This appeal relates to two decisions of the Board of General Appraisers covering a great number of protests by several different importing firms. The issue of law tendered by all of the protests is whether or not the imported articles the subject thereof are dutiable at 50 per cent ad valorem under paragraph 452 of the tariff act of 1909 and the last provision thereof as bags, baskets, belts, satchels, etc., "permanently fitted and furnished with traveling, bottle, drinking, dining, or luncheon and similar sets," or at the lesser rate claimed by the protestants as such bags, baskets, belts, satchels, etc., under the first provision of that paragraph, which reads as follows:

452. Bags, baskets, belts, satchels, card cases, pocketbooks, jewel boxes, portfolios, and other boxes and cases, made wholly of or in chief value of leather, not jewelry, and manufactures of leather, or of which leather is the component material of chief value, not specially provided for in this section, forty per centum ad valorem; any of the foregoing permanently fitted and furnished with traveling, bottle, drinking, dining or luncheon and similar sets, fifty per centum ad valorem.

It seems that the cases were submitted upon the records of the particular case. The Board of General Appraisers in a short decision stated:

The protestants in these cases submitted their protests upon the report of the appraiser. That report in each case either fails to state the character of the merchandise or covers merchandise which has been held by this board to be dutiable at the rate assessed therein. The protests are overruled. See *Mark Cross Co.'s case*, Abstract 33671 (T. D. 33763).

The court has before it the invoices and entries in all of these cases. What may be an immaterial fact, but one worthy of note as we proceed, is that of the 71 invoices included 64 are expressly submitted

¹ Reported in T. D. 34522 (26 Treas. Dec., 920).

upon the collector's letter and 7 upon the appraiser's report. The board proceeded upon the theory that either there were not sufficient evidentiary facts disclosed in any one of these records upon which to predicate a finding of fact, or assuming that fact to have been found by the board, such cases had already been passed upon in principle adversely to the importers' contention by this court. We think, from an examination of the records, including the invoices and entries, that in many at least of these cases there was sufficient in the appraiser's reports or the collector's letters upon which to predicate a finding of fact as to the character of the respective importations upon which might be predicated a decision under the particular statute. Moreover, that examination discloses that as to some of the articles, the character of which is sufficiently shown by the records, both the board and this court have rendered decisions favorable to the importers. Under the circumstances, it being necessary that the decisions of the Board of General Appraisers be reversed, we think that the ends of justice will be subserved by new trials. It is ordered accordingly. *Vandegrift v. United States* (3 Ct. Cust. Appls., 219; T. D. 32535).

Remanded.

SCHMITT v. UNITED STATES (No. 1308).¹

1. TESTIMONY OF A SINGLE WITNESS.

The testimony of a single witness unimpeached, whether or not corroborated by other circumstances in the case, may be held sufficient to sustain or reverse a judgment.

2. WHEN SUCH TESTIMONY NOT PERSUASIVE.

This witness's testimony did not disclose that the importations were of trimmed straw hats alone; and, in fact, the goods were invoiced as trimmed hats. Under the facts as appearing the board's decision will not be disturbed.

United States Court of Customs Appeals, May 28, 1914.

APPEAL from Board of United States General Appraisers, Abstract 33841 (T. D. 33795).

[Affirmed.]

Comstock & Washburn for appellant.

William L. Wemple, Assistant Attorney General (*Thomas J. Doherty*, special attorney, of counsel), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

DE VRIES, Judge, delivered the opinion of the court:

This appeal concerns importations of trimmed hats. The importations were made during the years 1909, 1910, 1911, and one importation during January, 1912. The articles in question were assessed for duty as silk wearing apparel at the rate of 60 per cent ad valorem

¹ Reported in T. D. 34523 (26 Treas. Dec., 922).

under the provisions of paragraph 390 of the tariff act of 1897 and paragraph 402 of the tariff act of 1909. It is claimed by the importer that the merchandise is properly dutiable at 50 per cent ad valorem as trimmed straw hats under paragraph 409 of the tariff act of 1897 and paragraph 422 of the tariff act of 1909, in conformity with the decision of this court in *United States v. Lord & Taylor* (4 Ct. Cust. Appls., 322; T. D. 33521). The Board of General Appraisers overruled the protests, using the following statement:

On the hearing of the protests the importer attempted to prove that the goods in question consist of trimmed hats the bodies of which are composed of straw, but his testimony is so vague and indefinite that it falls far short of establishing that fact.

On the record before us we do not feel justified in disturbing the decision of the collector, which is presumptively correct.

It is strenuously insisted by counsel for the appellant in their brief and at the oral argument in this court that, while the finding of the Board of General Appraisers challenges the convincing character of the testimony of the sole witness who testified at the trial, there are such corroborative facts in the record disclosed by an examination of the entries and invoices which, together with the unimpeached testimony of the witness, entitled the appellant to judgment.

It is very true that the testimony of a single witness unimpeached, whether or not corroborated by other circumstances in the case, might be held sufficient to sustain or reverse a judgment. This court in *Bradley Martin, jr., v. United States* (1 Ct. Cust. Appls., 134; T. D. 31185), said:

A witness is presumably truthful, and if upon the uncontradicted external facts, themselves not unreasonable or incompatible with strict honesty of conduct, the only deduction which is consonant with such presumption is in favor of the person arriving, it becomes the duty of the courts to sustain his statement rather than to discredit it.

So, in *Stern Bros. v. United States* (2 Ct. Cust. Appls., 405; T. D. 32167), this court accepted the corroborated and unimpeached testimony of a single witness, which was uncontradicted in the record, as sufficient to warrant a reversal of the decision of the board and its finding of fact in the case.

In order, however, to warrant this court in disturbing the well-settled rule that where there is sufficient testimony in the record supporting the finding of the board, that finding will not be disturbed unless the opposing evidence so accepted should be clear and convincing, though of course not to the degree of removing every reasonable doubt, as is the requirement in criminal procedure. The testimony here, which is relied upon by appellant in support of his contention, does not arise to this degree of certainty and conviction. Indeed, it is consonant with all that appellant has proven below that the necessary finding of the collector may be true as a fact in the case.

To illustrate, we will take an invoice used as a reference in the briefs and at the oral argument. This invoice is 14826, covered by protest 570878. Upon that invoice at page 3 are some of the items in controversy. They are identified by the letter D in this record, and are items invoiced as "trimmed hats." The examiner declared them to be silk wearing apparel, so noted on the invoice, and advised classification for dutiable purposes as such at 60 per cent ad valorem. On the following page, marked "C," are other items invoiced as "straw hats." The examiner likewise noted them as "untrimmed straw hats and manila hemp braid hats," and advised dutiable classification at 35 per cent ad valorem. Other similar items appear upon that invoice.

The whole case of appellant is made upon the testimony of the importer that while he could not say that he had actually seen these goods when imported and had no sample of the goods, that the items invoiced as "trimmed hats" on page 3 were trimmed straw hats, and that the only reason why he was so able to declare was the fact that in the same invoice were the articles invoiced as "straw hats." He reasoned from these two items that the trimmed hats were samples or models of trimmed straw hats, because the straw bodies invoiced with them were imported to be subsequently trimmed after the fashion of these models, and that therefore the trimmed hats must have been trimmed straw hats. While this testimony is argumentative purely, it might be held convincing were it not for the fact that upon cross-examination the witness testified that this was, in instances at least, a mere surmise; that in different seasons he imported other untrimmed hats than with straw bodies, and that during some seasons they imported trimmed hats with other than straw bodies, such as horsehair hats whenever they were in style.

The foregoing, which we deem a fair recital of the facts of the record, does not exclude the facts consistent with the finding of the collector. The witness did not testify that at that time they were not importing other trimmed hats than trimmed straw hats, nor did he testify that trimmed straw hats were the only trimmed hats that they were importing from the particular exporter or during the particular season or even at this particular shipment. Moreover, it would appear from the record and the statement of counsel at the argument in this court that all these goods invoiced as trimmed hats were entered for dutiable purposes by the importer as silk wearing apparel at 60 per cent ad valorem as assessed by the collector. While this fact did not preclude protest and the establishment of the contrary, we think under the circumstances of this record the court is not warranted in disturbing the decision of the board.

Affirmed.

UNITED STATES v. ECKSTEIN (No. 1310).

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ARTIFICIAL HORSEHAIR—BOARD'S MANDATE.

On reliquidation the collector disregarded the mandate of the board. The board had made an attempt by its order to segregate the cases in which the artificial horsehair covered by its decision was contained, and it is clear it was intended to decide that the cases named contained artificial horsehair.

United States Court of Customs Appeals, May 28, 1914.

APPEAL from Board of United States General Appraisers, G. A. 7516 (T. D. 33982).

[Affirmed.]

William L. Wemple, Assistant Attorney General (*William A. Robertson*, special attorney, of counsel; *Samuel Isenschmid*, special attorney, on the brief), for the United States.

Comstock & Washburn for appellee.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

On the 20th of June, 1906, the Board of General Appraisers rendered a decision covering a large number of protests against the assessment of duty at 30 per cent on artificial horsehair and artificial silk yarns. The board sustained one of the claims of the protests, holding that such artificial horsehair was dutiable at 20 per cent as a nonenumerated article. Appeals were taken from this decision of the board on behalf of the importer as to the proper rate of duty applicable to artificial horsehair. The final decree of the district court reciting that the Circuit Court of Appeals of the Second Circuit had rendered a decree ordering, adjudging, and decreeing that the United States court for the southern district of New York was erroneous, and that the same should be reversed, and that the merchandise was properly dutiable at 6 cents per pound under paragraph 302, and reciting that on appeal to the Supreme Court that decree had been affirmed, an order was entered adjudging and decreeing that the judgment and decree of the United States Court of Appeals for the Second Circuit "be and the same is hereby made the judgment of this court."

The reference to the merchandise in this opinion evidently relates to the merchandise dealt with by the Board of General Appraisers, and a reference is therefore necessary to the decision of the Board of General Appraisers to ascertain what was the subject of determination there.

Turning to the decision of the Board of General Appraisers (T. D. 27442), entitled "In the matter of protests of E. A. Magnin et al.," we find the decision to be, after reviewing the claim under the horsehair provision:

This claim in the protests is sustained and the decisions of the collector modified as to the artificial horsehair included in the importations affected and enumerated in Schedule A. The importers having abandoned all claims as to so-called artificial silk yarn comprised in some of the importations, the same are overruled.

¹ Reported in T. D. 34524 (26 Treas. Dec., 924).

Upon a remand to the collector it appeared that in Schedule A there was included a large number of protests, and the schedule consists of the number of the protest, the number of the invoice, and the numbers of the cases included. The protest in question was 147635, the invoice number 15685, and the cases numbered from 4097 to 4106, inclusive. When the collector came to reliquidate under this decision, he reliquidated the contents of four of these cases as artificial silk, notwithstanding the mandate of the board, and thereupon a second protest was filed, and on a review of this action by the Board of General Appraisers the reliquidation as to these cases was overruled and a reliquidation of the items as horsehair directed. From this decision of the board the Government appeals.

We think it is clear that by the action taken in review of the decision of the board the legal effect was to affirm the decision of the Board of General Appraisers as to all items included in this decision. We therefore have to consider only a construction of the language of the decision of the board, which is—

This claim in the protests is sustained and the decisions of the collector modified as to the artificial horsehair included in the importations affected and enumerated in Schedule A.

The Government contends that this language was not intended to import a finding that the contents of the various cases named in Schedule A were in fact artificial horsehair. The language is subject to a possible interpretation which would lead to this result, and the question is at best not free from doubt. But when it is considered that the protests included a large number of importations and a large number of entries and cases, and that an attempt was made by the board in its order to segregate the cases in which the artificial horsehair covered by its decision was contained, the better construction seems to be that the board intended to decide that the cases named contained artificial horsehair.

The case would be stronger for the Government had there been contained in any one of the four boxes named some artificial horsehair—concededly such—commingled with other goods. In that case it might be urged with much more force that it was only the artificial horsehair which was included within these cases that the board undertook to deal with. But it is undeniable that the board did determine that these cases of goods, in some part at least, fell within the decision which it rendered. There was no propriety in including any reference to the four cases in question in its decision if in fact they contained no artificial horsehair, and, it appearing that the contents of these boxes were all of one grade and all alike, so far as the record discloses, it must be held that there was a purpose to determine that the contents were in fact artificial horsehair and fell within the terms of the board's decision.

This was the view of the first board decision, accepted by the Board of General Appraisers in the present case, and we think the correct result was reached.

Affirmed.

SHALLUS v. UNITED STATES (No. 1319).¹

VALIDITY OF REAPPRAISEMENT OF LINOLEUM.

A board of reappraisement is not a judicial tribunal and may use information acquired on previous appraisements. They had here jurisdiction of the subject of the proceedings, and the classification board did not err in sustaining the other board's action.—*Wolff v. United States* (1 Ct. Cust. Appls., 181; T. D. 31217).

United States Court of Customs Appeals, May 28, 1913.

APPEAL from Board of United States General Appraisers, Abstract 33998 (T. D. 33833).

[Affirmed.]

Walter Evans Hampton for appellant.

William L. Wemple, Assistant Attorney General (*William A. Robertson*, special attorney, of counsel), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

This is an appeal from a decision of the Board of General Appraisers sustaining the action of a reappraisement board refusing a reappraisement of shipments of linoleum from England.

The record is voluminous and the issues somewhat involved, but we think the meritorious questions may be gathered from the brief of counsel. As we construe the brief, the contention is that the facts are that linoleum is sold in England, deliverable at any point in England at a stated price, which includes freight to destination, and that the average of such freight was represented by a 10 per cent deduction noted on the invoice and disallowed by the appraiser.

Obviously, this 10 per cent could at best be but an estimate, as the brief of counsel states that such freight would amount to from 8 to 12 per cent. The contention was made before the general appraiser and the board of reappraisement that the price, less the freight, or rather the 10 per cent estimate average of freight, should control.

The reappraisement board found the facts as follows:

Manufacturers of linoleum in Great Britain sell their product at the same prices to all purchasers and agree at their own expense to pay all costs and charges incidental to its delivery in every part of the Kingdom. The result of this custom is that while the purchasers all pay the same price, the sellers realize varying net sums according to the cost of delivery to the many places whence shipped. There is proof here of sales and deliveries to certain distant and remote places in Great Britain, but there is no proof of sales or deliveries to any large or near-by cities of importance where the cost of transportation is much lower than to the places included in the proofs submitted.

¹ Reported in T. D. 34525 (26 Treas. Dec., 926).

The proofs in other reappraisements on linoleums show that there is a large market for such merchandise in London, and that the cost of transportation to London does not differ much from the cost of transportation to seaboard, which we allow in this case. The importers here claim that market value is that net price which the manufacturer receives after deducting the highest freight rate paid by him. If this contention be well founded it would follow that as we must take the market price on the day of shipment, that that price would vary each day according to place of delivery in Great Britain. If to a distant and remote place, the value would be low. If to a near-by place, the value would be high. He would thus be allowed to select his own time and conditions for duty purposes, and this we consider improper. This importer secures free freight to seaboard, which places him on a parity with some domestic purchases, and this we allow.

It is obvious from this finding that the board found London to be one of the principal markets of the country of export and adopted the price there prevailing. Assuming that the general appraiser and the reappraisal board proceeded within their respective jurisdictions, the finding of the principal market is not open to review by the classification board or this court. *Stairs v. Peaslee* (18 How., 521, 527); *Horace Day Co. v. United States* (3 Ct. Cust. Appls., 152, 160); subsec. 10, sec. 28, act of 1909.

But the importer contends that the board took into consideration evidence in other cases not introduced in the proceedings before them. The record discloses that the board did consider evidence in other cases. But as the importer introduced other records of reappraisal, it may be assumed that these records were the ones to which the board made reference. But we again repeat that the board on reappraisal is entitled to use information acquired by them on previous appraisements. It is an appraising body and is not a judicial tribunal. *Wolff v. United States* (1 Ct. Cust. Appls., 181; T. D. 31217).

This case is clearly distinguishable from *Lewisohn v. United States* (5 Ct. Cust. Appls., 204; T. D. 34329), relied upon by the importers. That case disclosed the fact that the addition to the invoice value resulted from a mere construction of the terms of the invoice. The facts not being in dispute, the reappraisal board having by its findings entered simply "prices as invoiced," it became a question of law what the invoice legally imported.

The present case is ruled by our own decisions in *Wolff v. United States*, *supra*; *Harris v. United States* (3 Ct. Cust. Appls., 5; T. D. 32286), and *Oelrichs v. United States* (2 Ct. Cust. Appls., 355; T. D. 32091).

The board of reappraisal not having been shown to have proceeded upon the wrong principle, and having had jurisdiction of the subject of the proceedings, the classification board committed no error in sustaining the action of the board of reappraisal.

The decision is *affirmed*.

UNITED STATES v. BAIZ & Co. (No. 1330).¹

EVIDENCE.

The importers should not have been compelled to have their case adjudged on an incomplete record of evidence they sought rightly to complete; moreover, the board erred in considering records improperly received in evidence.

United States Court of Customs Appeals, May 28, 1914.

APPEAL from Board of United States General Appraisers, Abstract 34182 (T. D. 33963).

[Remanded.]

William L. Wemple, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, of counsel; *Leland N. Wood*, special attorney, on the brief), for the United States.

Jules Chopak, jr., for appellees.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

SMITH, Judge, delivered the opinion of the court:

Certain merchandise known as "Lanza perfumes," classified by the collector of customs at San Juan, P. R., as perfumery in the manufacture of which alcohol was used, was assessed for duty at 60 cents per pound and 50 per cent ad valorem under paragraph 67 of the tariff act of 1909, which paragraph, in so far as pertinent, reads as follows:

67. Perfumery, including cologne and other toilet waters, articles of perfumery, whether in sachets or otherwise, * * * all the foregoing; if containing alcohol, or in the manufacture or preparation of which alcohol is used, sixty cents per pound and fifty per centum ad valorem; * * *.

The importer protested that the merchandise was ethyl chloride, dutiable at 30 per cent ad valorem under the provisions of paragraph 21 of the same act, which paragraph in part reads as follows:

21. * * * Ethyl chloride, thirty per centum ad valorem: * * *.

On the hearing before the board, an examiner in the appraiser's office at the port of New York was called as a witness for the importers, and after the official sample taken in the pending protest 688005 was submitted to his inspection, he testified that he had passed similar merchandise. His attention having been then called to samples covered by protests 587089, 586268, and 654614, which apparently had been heard and determined by the board at an earlier date, he stated in response to questions that the merchandise which was the subject of the pending protest was similar in character to that involved in the protests which had been determined, but was of a very different odor. The witness said that the difference in odor was attributable to the essential oils which had been added to the ethyl chloride and which had the quality of imparting a perfume to the product. Counsel for the importers then moved that the records in protests 585268, 587089, and 654644 (*sic*) be incorporated as a part of the record in the pending case. The Government objected on the ground that the witness had testified that the odors

¹ Reported in T. D. 34526 (26 Treas. Dec., 928).

were different in each case. The board denied the motion to incorporate, but stated that it would "look at both of them." Such a ruling was calculated to lead the importers to believe that the records would be considered as evidence and the Government to believe that the records were excluded, and under such circumstances we are of opinion that neither was put on such notice as to the real nature of the ruling as to oblige the taking of an exception. Some further testimony was then introduced on the part of the importers from which it appeared that the merchandise in question was composed of ethyl chloride and a small amount of essential oil, certainly not above 5 per cent. The testimony was to the effect that the odor of the essential oil was quite perceptible, but that a trace of essential oil would produce that effect. The Board of General Appraisers sustained the protest of the importers, and from its decision it appears that it considered the records in the protests, the admission of which as evidence were denied. The Government appealed, and a motion was then made in this court that the records in the protests which had been refused admission to the record in the case at bar be sent up to this court for consideration as part of the evidence. Inasmuch as they were denied admission by the board and the Government had no opportunity to cross-examine on the pending issue the witnesses produced on the hearing of such protests, we must deny the importers' motion that the records in the protests considered by the board as evidence be brought up for consideration on this appeal.

In view of the fact that the importers ought not to be compelled to submit their case on a record which does not contain all the evidence which they diligently sought to introduce, and inasmuch as the board erred in considering the records which had not been properly received in evidence, its decision must be reversed and the case remanded for a new trial.

Remanded.

UNITED STATES *v.* GRASSELLI CHEMICAL Co. (No. 1332).¹

WOVEN FABRICS IN CHIEF VALUE OF ASBESTOS.

The merchandise is a plain, loose, open weave of thick asbestos cords. The change in the language of the tariff act of 1909 clearly manifests a legislative intention separately to provide for woven asbestos. The goods here are woven fabrics and fell properly under the last clause of paragraph 462 of that act.

United States Court of Customs Appeals, May 28, 1914.

APPEAL from Board of United States General Appraisers, Abstract 34310 (T. D. 34026).

[Reversed.]

William L. Wemple, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, of counsel), for the United States.

Brown & Gerry for appellee.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

¹ Reported in T. D. 34527 (26 Treas. Dec., 930).

SMITH, Judge, delivered the opinion of the court:

The merchandise in this case was classified by the collector of customs at the port of New York as "a woven fabric in chief value of asbestos." The importation was accordingly assessed for duty at 40 per cent ad valorem under that part of paragraph 462 of the tariff act of 1909, which reads as follows:

462. * * * Woven fabrics composed wholly or in chief value of asbestos, forty per centum ad valorem.

The importers protested that the goods were "articles of asbestos" and that they were therefore dutiable as manufactures of asbestos under that part of said paragraph which reads as follows:

462. Manufactures of amber, asbestos, bladders, catgut or whip gut or worm gut, or wax, or of which these substances or any of them is the component material of chief value, not specially provided for in this section, twenty-five per centum ad valorem; * * *.

The merchandise in controversy is about 54 inches long and 30 inches wide, and as appears from the exhibits in evidence is a plain, loose, open weave of thick asbestos cords. The warp cords are turned back on the fabric and bound to it by sewing over them with fine asbestos threads a closely woven band of asbestos cloth a little less than an inch in width.

The board found that the importation consisted of completed articles and held that it was covered by the provision for manufactures of asbestos rather than by the provision for woven fabrics of asbestos, the material from which such articles were made. The importers' protest was accordingly sustained and the Government appealed.

Whether the goods may be regarded as articles in the sense that they were complete and ready for ultimate use we think is unnecessary to decide. Conceding them to be articles for the purposes of this case, that fact would not, in our opinion, remove them from the category of woven fabrics or exclude them from the purview of the last clause of paragraph 462. In the tariff acts of 1883, 1890, 1894, and 1897 woven fabrics of asbestos were not provided for *eo nomine*, but were subjected to duty as "manufactures of asbestos." In 1909, however, manufactures of asbestos and woven fabrics of asbestos were separately provided for in the same paragraph and subjected to a different rate of duty. That departure from the wording of previous tariff acts clearly manifested, in our opinion, a legislative intention to provide separately for such manufactures of asbestos as were made by weaving and to provide for them under the specific designation of woven fabrics with a higher rate of duty than that prescribed for manufactures of asbestos in general.

The body of the fabric involved in this appeal and the material with which it is bound are of woven asbestos. The binding, it is true, is stitched to the goods, and to that extent it may be said that

the product has been subjected to a process other than that of weaving. Inasmuch, however, as one purpose of the binding was apparently to prevent the unraveling of the fabric and to preserve the weave, we think the goods are woven fabrics as that expression is commonly understood, and that they are therefore within the intent and meaning of the last clause of paragraph 462. The interpretation of that paragraph contended for by the importers would result in subjecting articles made from woven asbestos to a lower rate of duty than the materials from which such articles were made, and that intention we can not impute to Congress when the language used to express the legislative will clearly warrants a construction entirely in accord with the policy which usually governs Congress in determining relative rates of duty.

The decision of the Board of General Appraisers is *reversed*.

UNITED STATES *v.* MOOS & Co. *et al.* (No. 1343).¹

OLIVE OIL IN TINS—GALLON MEASURE.

All olive oils are not of the same specific gravity. The method adopted here by the collector for determining the quantity of the importation in gallons was correct. The English wine gallon of 231 cubic inches capacity, and not a lesser quantity, though accepted by the trade, is the "gallon" of paragraph 38, act of 1909.

United States Court of Customs Appeals, May 28, 1914.

APPEAL from Board of United States General Appraisers, G. A. 7534 (T. D. 34216).

[Reversed.]

William L. Wemple, Assistant Attorney General (*Leland N. Wood*, special attorney, of counsel), for the United States.

Brown & Gerry and *Brooks & Brooks* for appellees.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

SMITH, Judge, delivered the opinion of the court:

Olive oil imported at the port of New York and classified by the collector of customs as "olive oil in tins containing less than 5 gallons each," was assessed for duty at 50 cents per gallon under the provisions of that part of paragraph 38 of the tariff act of 1909 which reads as follows:

38. Olive oil, * * * in * * * tins, or other packages, containing less than five gallons each, fifty cents per gallon.

The importers protested that the merchandise was olive oil not specially provided for and therefore dutiable at 40 cents per gallon under that part of said paragraph 38 which reads as follows:

38. Olive oil, not specially provided for in this section, forty cents per gallon; * * *.

¹ Reported in T. D. 34528 (26 Treas. Dec., 932).

The Board of General Appraisers sustained the protests and the Government appealed. The olive oil in controversy was imported in tins. After the arrival of the goods one or more tins of each brand of oil was weighed and the gross weight of tin and oil secured in pounds and fractions of a pound. The tin was then opened and the oil withdrawn and weighed, which gave the weight of the oil which the tin contained. The weight of the oil subtracted from the gross weight of the tin and oil, gave the weight of the tin. A measured gallon of the same oil was then weighed, and that furnished the weight of a gallon of that particular brand in pounds and fractions of a pound. On these data, and without opening all the tins of each importation, the number of gallons per tin was calculated by dividing the net weight of the oil in each tin by the ascertained weight of a gallon of olive oil of that special brand. By this method the quantity of oil contained in the tins covered by the several protests and the weight of the oil per gallon was found by the collector to be as follows:

| Protest No. | Name of importer. | Gallons per tin. | Weight of a gallon in pounds. |
|-------------|------------------------------|------------------|-------------------------------|
| 648878 | Strohmeyer & Arpe Co..... | 4.93 | 7.62 |
| 710598 | R. U. Delapenha & Co..... | 4.93 | 7.62 |
| 705402 | do..... | 4.91+ | 7.64 |
| 710371 | Francis H. Leggett & Co..... | 4.90 | 7.62 |
| 708261 | do..... | 4.92 | 7.62 |
| 708261 | do..... | 4.88 | 7.62 |
| 666517 | do..... | 4.87+ | 7.61 |
| 674893 | Rockhill & Viotor..... | 4.93+ | 7.625 |
| 664561 | Von Bremen, Asche & Co..... | 4.93 | 7.56 |
| 705243 | A. Starace..... | 4.83 | 7.56 |
| 705244 | do..... | 4.83 | 7.56 |
| 675387 | do..... | 4.83 | 7.56 |
| 668997 | do..... | 4.87+ | 7.59 |
| 663787 | Austin, Nichols & Co..... | 4.91 | 7.59 |
| 646218 | Moos & Co..... | 4.92 | 7.63 |

At the hearing before the board the importers contended that the tins actually contained 5 gallons of oil, and that whether they did or not they must be so considered inasmuch as they were regarded and accepted by the trade as 5-gallon tins containing that quantity of oil. The witnesses produced by the importers in support of this contention testified in effect that the tins were known in the trade as 5-gallon tins, and that they were bought, sold, labeled, advertised, and represented to buyers as containing 5 gallons of oil. Some of the witnesses testified that from time to time tests were made by them of the quantity of oil in the tins, but none of them, so far as is disclosed by the record, actually tested any of the tins which were made the subject of protest, and consequently none of them was in a position to say just what was the quantity of oil imported in such tins. The tests for quantity made by the importers of olive oils other than those imported were not made on the basis of the weight of a gallon of the particular oil tested, but on the flat basis of 7.56 pounds per

gallon for all oils, irrespective of brand. Some of the witnesses admitted that even on this basis tins of oil had been found short of 5 gallons, but stated that notwithstanding that fact no allowance was made to the buyer for the deficiency, and that such short tins were sold by the importers and bought and paid for by the buyers as 5 gallons of oil. It appears from the record that olive oil is not bought abroad by the gallon, but by weight, and that it is sold in this country not by weight, but by the gallon.' The board on this evidence held, first, that the Government had not ascertained the actual quantity of oil imported, and, second, that the tins covered by the importations were commercial 5-gallon tins of olive oil. On these findings of fact the board sustained the protests and the Government appealed.

Inasmuch as the method pursued by the Government in determining the number of gallons contained in the tins was designed to secure an accurate result, and inasmuch as there was no evidence whatever produced by the importers showing that there was any error upon the part of the collector in ascertaining the quantity of oil held by the tins of the several importations, we find ourselves unable to sustain the first finding of the board. It was of course wholly impracticable to open each tin and to measure the number of gallons which it contained by a gallon measure. Such a course would have caused serious loss and would have necessitated the resealing of the tins, if not the repacking of the oil in new containers, a contingency which the collector was fully justified in avoiding if quantities might be ascertained by a method less prejudicial to the goods, especially if that method was sanctioned by the trade itself. As olive oils of the *same brand* had apparently the same specific gravity the collector was warranted in taking the weight of a single gallon of any brand as a basis for the determination of the quantity of oil in all tins of that brand. Some of the containers may have weighed more and some less than the sample container, but as the weight of the sample tins minus the oil appears to have been accurately taken, that weight for all tins of the same brand must be accepted in the absence of any showing to the contrary by the importers. We think, therefore, that the means adopted by the collector to ascertain the number of gallons per tin was designed to secure a correct result, and in this opinion we are confirmed by the fact that some of the importers testified that the weighing test was the method employed by them in ascertaining the number of gallons per tin. In making *their* test, however, the importers, instead of taking as the basis for their calculation the actual weight of a gallon of the brand to be tested, took 7.56 pounds as the weight per gallon of all olive oils, and to that must be attributed their difference with the collector as to the *actual* quantity of oil imported. In view of the fact that all olive oils are not of the

same specific gravity and that for the same volume some brands weigh more and some less than others, it is apparent that a fixed basis of 7.56 pounds can not be made applicable to all olive oils, and that if it is used for the purpose of determining quantities of olive oils having a specific gravity which is not the equivalent of that weight an inaccurate result is sure to follow.

We find that on the basis of 7.56 pounds to the gallon, two sample tins out of the 15 examined reached 4.97 + gallons to the tin, three 4.96 +, two 4.95 +, one 4.94 +, two 4.93 +, one 4.91 +, one 4.89 +, and three 4.83 +. From this it is evident that even on the importers' incorrect basis of calculation, none of the sample tins examined measured up to 5 gallons and that less than half of them came within 1 per cent of containing 5 gallons. Taking the actual weight of a gallon of oil of each brand as the basis of calculation, the more accurate method of ascertaining the contents of the tins without opening them, not one of the sample tins tested contained 4.95 gallons of oil.

The board found, however, that the tins were, *commercially speaking*, 5-gallon tins, and from that it was deduced that the several importations were excluded from the operation of the last clause of paragraph 38. If we sustain that conclusion, we must sustain it either on the theory that the duty of 50 cents per gallon was laid on tins of less than 5 gallons capacity or on the theory that what constituted 5 gallons of olive oil might be determined by trade usage and custom. We can not agree with either theory. Had paragraph 38 imposed a duty of 50 cents per gallon on tins of less capacity than 5 gallons, it is possible that evidence *might* have been properly given as to what was the commercial understanding of a 5-gallon tin. No such construction, however, can be placed on the paragraph and this court so declared in two cases, in which it was held that the duty of 50 cents per gallon was not laid by the paragraph upon tins of less than 5 gallons capacity, but on tins containing less than 5 gallons of oil. *United States v. Palma* (4 Ct. Cust. Appls., 140; T. D. 33412); *United States v. Sprague, Warner et al.* (4 Ct. Cust. Appls., 358; T. D. 33532). In other words, whether a duty of 40 cents a gallon or of 50 cents a gallon should attach to oil in tins must be determined by the quantity of oil contained in the tins and not by the size of the package. That brings us to the consideration of whether the expression "five gallons" used in the paragraph was intended by Congress to mean a trade 5 gallons or 5 gallons measured in accordance with official standards.

It is a matter of history that most of the weights and measures in common use in the United States are of English origin and in colonial times were the legally established weights and measures of this country. The colonies having accomplished their independence, the Congress was authorized by the Constitution to "fix the standard of

weights and measures;" but the authority thus conferred was never exercised so far as the enactment of general legislation was concerned. From that it followed that the weights and measures of England continued to be the legal weights and measures of the United States unless altered by State legislation or by a usage so general, common, and long established as to have ripened into law. Whether because of State legislation or because of variations in standards brought about by local custom, common use, or carelessness, a lack of uniformity in the weights and measures had apparently so far developed in the year 1830 that a resolution was adopted by the United States Senate directing the Secretary of the Treasury to make an investigation of the weights and measures in use in the principal customhouses of the country and report the result to the Senate. (Senate resolution of May 29, 1830.) As a result of this investigation the avoirdupois pound, the English wine gallon of 231 cubic inches capacity, and the bushel of 2,150.42 cubic inches capacity were adopted by the Treasury Department as standard measures for customs uses. (See letter of the Secretary of the Treasury to the President of the Senate, dated June 20, 1832, and F. R. Hassler's report therewith forwarded; also supplementary report of F. R. Hassler, dated June 29, 1832, and letter of the Secretary of the Treasury to the President of the Senate, dated June 30, 1832.)

The standards of weights and measures adopted and in use in the customhouses were so far recognized by the Congress that they were ordered to be sent to the governors of the States or such persons as they might appoint for the use of the States and "to the end that an uniform standard of weights and measures may be established throughout the United States." (Joint resolution of June 14, 1836.)

Under these circumstances, we think there is no escaping the conclusion that the gallon for customs purposes was a vessel of 231 cubic inches capacity, and as appears from the official documents and records was the equivalent in volume of 8.33888220 pounds avordupois of water weighed at its maximum density at 30 inches and at a temperature of 62° F. (See "gallon," Century Dictionary, and report of Hassler, *supra*.) That gallon having been recognized by Congress as a standard measure, and being in use in the customhouses of the United States at the time of the passage of the tariff act of 1909, it is evident, we think, that the term "gallon," as used in the act, meant the quantity measured by a vessel of 231 cubic inches capacity and not a lesser quantity which the trade might accept as a gallon of some particular commodity.

But even if no standard gallon had been officially adopted for customs purposes, the evidence adduced by the importers wholly failed to establish the existence of a commercial gallon measure for olive oil different from that in general use for the measurement of

other liquids. The witnesses who testified on the subject of commercial usage confined themselves to the statement that oil which came in 5-gallon tins was commercially regarded as 5 gallons of oil, regardless of the actual quantity which the tin might contain. None of them pretended to say, however, that there was any commercial measure by which a commercial gallon of olive oil might be ascertained or that any specific quantity less than 5 standard gallons constituted 5 trade gallons of olive oil. For these reasons we think that the decision of the Board of General Appraisers should be reversed.

Reversed.

BLUMENTHAL & Co. *et al.* *v.* UNITED STATES (No. 1344).¹

BUTTONS OF GLASS AND FISH SCALES.

There was no evidence tending to show that the merchandise was commercially known as buttons of glass, and the evidence did not establish the fact that they were buttons composed of glass in chief value. The present case is no exception to the general rule that merchandise made, composed, or manufactured of a specified article is classified with reference to the component material of chief value, and there is here nothing to show that glass is the predominant material.

United States Court of Customs Appeals, May 28, 1914.

APPEAL from Board of United States General Appraisers, G. A. 7530 (T. D. 34126).

[Affirmed.]

Comstock & Washburn for appellants.

William L. Wemple, Assistant Attorney General (*William A. Robertson*, special attorney, of counsel; *Samuel Isenschmid*, special attorney, on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

BARBER, Judge, delivered the opinion of the court:

This case involves a considerable number of protests by various importers and relates to buttons of different colors made of glass and fish scales. Two exhibits are returned as representing all the importations concerning which any question is made. The globes of the buttons are of hollow, transparent glass, the interior of which is lined or coated with fish scales, which coating is visible or shines through the glass and gives to the buttons the white or colored effects shown by the exhibits. The shanks seem also to be of glass. The testimony taken before the board does not show whether the glass or the fish-scale coating is the component material of chief value, nor does it appear what processes are employed in the manufacture of these buttons. They were assessed by the collector as buttons not specially provided for under paragraph 427 of the tariff act of 1909 at 50 per cent ad valorem, which assessment was sustained by the board.

¹ Reported in T. D. 34529 (26 Treas. Dec., 937).

This paragraph, so far as relevant to the issues here, provides for buttons of various materials, among which are mentioned bone, pearl, shell, horn, vegetable ivory, glass, and metal at different rates of duty. The rate provided for buttons of glass being three-fourths of 1 cent per line per gross and 15 per cent ad valorem; near the close of the paragraph provision is made for "buttons not specially provided for * * * and all collar or cuff buttons * * * composed wholly of bone * * * fifty per cent ad valorem."

The appellants here confine themselves to the claim that the merchandise is dutiable at three-fourths of 1 cent per line per gross, plus 15 per cent ad valorem, as buttons of glass.

Extracts from the reports of the appraiser contained in the record show that the following terms were used by him to describe the merchandise, viz, "composition-covered glass buttons," "glass buttons covered with fish scales," "glass buttons covered with composition," "buttons, some composed of glass covered with fish scales," "buttons composed of glass and covered with fish scales, the latter chief value," "celluloid covered buttons," "fish-scale covered buttons," "buttons composed in chief value of fish scales," "composition-covered buttons," "fish scale, composition-covered buttons," "composition-filled buttons," "glass buttons covered with a composition not mentioned in paragraph 427," "buttons composed of gallilith and cloth," "buttons composed of mother-of-pearl covered with fish scales, the latter chief value," "wax buttons," and "glass buttons covered or filled with fish scale."

The importers rest their claim upon two propositions, (1) that these buttons are commercially known as buttons of glass, and (2) that whether so or not they are in fact such buttons.

Before the Board of General Appraisers they introduced evidence designed to prove that the merchandise was commercially known as "glass buttons." While it is true that on their direct examination the witnesses so testified, yet upon cross-examination it clearly appeared that so far as these witnesses knew there was not in the trade any uniform and definite understanding to that effect, and that the importing firms whom the witnesses represented, as well as other wholesalers of the merchandise, did not generally or uniformly refer to these buttons as "glass buttons." If any distinction can be drawn between the terms "buttons of glass" and "glass buttons" it may be observed that the importers introduced no evidence tending to show that the merchandise was commercially known as "buttons of glass." For the purposes of this case, however, we are not disposed to consider that any such distinction exists.

The board held that the claimed commercial meaning had not been shown to be uniform and definite, and we think this holding was warranted by the testimony.

As to the second claim the importers point to the language employed by the appraiser in his reports before herein referred to, as well as certain other evidence, to support the contention that the merchandise is in fact buttons of glass.

Any claim that the buttons are *wholly* composed of glass is completely negatived by the fact that it is agreed they are composed of glass and fish scales. They can not be held to be composed of glass in chief value because, as stated, the evidence does not establish that fact.

But the importers finally argue that regardless of the question of component material of chief value, these buttons are in law buttons of glass because their framework is glass and that substance is the predominant material of which they are composed, citing *United States v. Zinn* (2 Ct. Cust. Appls., 419; T. D. 32171), *United States v. Butler* (3 Ct. Cust. Appls., 390; T. D. 32984), *Hempstead v. United States* (168 Fed., 450), and *Woodruff v. United States* (168 Fed., 452).

The general rule is that when a statute imposes duty upon an article as "made of," "composed of," or "manufactured of" a specified material without declaring to what extent it must be of that material it is at least confined to merchandise of which the specified material is the component of chief value. *Kenyon v. United States* (4 Ct. Cust. Appls., 344; T. D. 33529) and cases therein cited.

We think this rule is applicable to the merchandise in the present case. The fact that paragraph 427 expressly provides for some buttons composed *wholly* of certain materials tends to sustain the view that as to other buttons their classification thereunder depends upon their component material of chief value.

In *Blumenthal v. United States* (144 Fed., 384) the same construction was placed upon paragraph 414 of the act of 1897, which is identical with paragraph 427 so far as relates to the issue.

We are not unaware that the case of *United States v. Zinn*, *supra*, has been claimed as an authority for the proposition that predominance rather than chief value of a component material may be resorted to for the purpose of determining the classification of an article made, composed, or manufactured of more than one material.

As we have had occasion in other decisions to point out, the question there was whether baskets composed of wood containing a lining of silk were dutiable under an *eo nomine* provision for baskets of wood or as manufactures of silk. While it appeared that silk was the component raw material of chief value, it did not appear that, when the component materials, namely, the basket of wood and the silk lining were put together to make the completed article, the silk lining was of greater value than the wooden basket. Under these facts it was *decided* that the *eo nomine* designation of baskets of wood was more specific than manufactures of silk.

In the case of *United States v. Butler*, *supra*, the question was whether stenciled screens composed of strips of wood joined or sewn together with cords should be classified under an *eo nomine* provision for shades or screens of wood or as manufactures of wood. Wood was the component material of chief value and it was again decided that the *eo nomine* provision was the more specific.

Language was employed in the decisions in both of these cases indicating a recognition of the proposition that sometimes the classification of an article may be governed by its predominant material rather than by its component material of chief value and such is the effect of the *Hempstead* and *Woodruff* cases above cited by the importers, which cases were referred to and cited by this court in its two decisions just above mentioned.

It will be noticed that in all these cases, paragraphs containing an *eo nomine* provision were contrasted with a provision for manufactures of a material, and in each case it was held that the *eo nomine* provision was the more specific.

In the *Hempstead* and *Woodruff* cases the court classified the merchandise under an *eo nomine* provision, which, if it had been classified upon its component material of chief value, could not have been done. So far as we know, these are the leading cases upon the proposition that specific merchandise made, composed, or manufactured of an article may sometimes be classified as such, although the specified article is not the component material of chief value. The *Hempstead* case well illustrates the reason. There the article was an ornate wooden table decorated with brass, brass being the material of chief value. The wood, of course, was the predominant material; it gave to the table its form and shape and was its indispensable material so far as use was concerned. For all utilitarian purposes the wood was the component material of chief value. The court said that in common speech this table belonged to the class of furniture of wood, and held it so dutiable.

We are not disposed here to say that a case may not again arise relating to an article *eo nomine* referred to in a tariff statute in which it may not be held that its classification is to be determined by the predominant material rather than the component material of chief value. To warrant that holding, however, we think it must at least appear that such predominant material, though not the component of chief value, nevertheless gives to the article its name, form, and shape, and determines its character and use, and that in addition it should clearly appear that in the common understanding the *eo nomine* statutory description included the article under consideration without regard to its component material of chief value.

But independent of the view we have already expressed as to the merchandise here, we do not think the present case is any exception to the general rule that merchandise made, composed, or manu-

factured of a specified article is classified with reference to the component material of chief value.

The ordinary meaning of the word "button" is a knob, globe, or disk of some substance having a shank or perforation or other means by which it may be attached to one part of a garment and used to join it to another part by passing through a buttonhole, or it may be used for ornamentation wholly. There are various extended meanings commonly applied to the word which are not applicable here. The buttons in this case are of fragile construction, which, coupled with their shape and the fact that they are of different colors, indicates that they are designed for purposes of ornamentation; hence, while glass is the material which gives them their form and shape, there is nothing to show that in their *use* as ornaments glass is the predominant material. Considering them as ornaments it would seem that glass was not the predominant material, but that the fish scales were. The fact that the fish-scale coating is used to line the interior would seem to confirm this conclusion, otherwise its employment in the manufacture of the button was not only unnecessary but useless. In common speech we do not think they would be referred to as buttons of glass without other descriptive language.

In view of what has already been said, it is obvious that in our opinion the judgment of the Board of General Appraisers ought to be, and it is, *affirmed*.

STROHMEYER & ARPE Co. v. UNITED STATES (No. 1345).¹

FRESH MACKEREL PACKED IN ICE IN PACKAGES.

The merchandise does not come within the *eo nomine* designation of fresh mackerel in paragraph 273, tariff act of 1909. It was properly assessed as fish in packages of less than one-half barrel, dutiable at 30 per cent ad valorem under paragraph 270, act of 1909.

United States Court of Customs Appeals, May 28, 1914.

APPEAL from Board of United States General Appraisers, Abstract 34762 (T. D. 34186).

[Affirmed.]

Brown & Gerry for appellants.

William L. Wemple, Assistant Attorney General (*Charles D. Lawrence*, special attorney, on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MARTIN, Judge, delivered the opinion of the court:

The merchandise involved in this case was reported by the appraiser to be "fresh mackerel packed in ice in packages containing less than 100 pounds (the regular half-barrel quantity)." The appraiser returned the same for duty as fish in packages of less than one-half barrel dutiable at 30 per cent ad valorem under paragraph 270, act of 1909. Duty was assessed upon the importation in accordance with this return.

¹ Reported in T. D. 34530 (26 Treas. Dec., 941).

The importers duly filed their protest against the assessment, claiming duty upon the merchandise at the rate of 1 cent per pound under the provision for "mackerel, * * * fresh," in paragraph 273 of the act of 1909, or alternatively at three-fourths of 1 cent per pound as fish, smoked, dried, salted, pickled, or otherwise prepared, or at 1½ cents per pound as fish skinned or boned under the same paragraph.

The protest was submitted without evidence to the Board of General Appraisers and the same was overruled, from which decision the importers now appeal.

The following is a copy of the relevant part of paragraph 270 and of paragraph 273 in full:

270. * * * Fish in packages, containing less than one-half barrel, and not specially provided for in this section, thirty per centum ad valorem; * * *.

273. Fish, fresh, smoked, dried, salted, pickled, frozen, packed in ice or otherwise prepared for preservation, not specially provided for in this section, three-fourths of one cent per pound; fish, skinned or boned, one and one-fourth cents per pound; mackerel, halibut, or salmon, fresh, pickled, or salted, one cent per pound.

The sole question in the case is whether the imported mackerel are dutiable under the provision for "fish in packages, containing less than one-half barrel, and not specially provided for in this section," contained in paragraph 270, or under the provision for "mackerel, * * * fresh," contained in paragraph 273.

The appellants present this issue to the court as a competition in specificity between these two classifications; and argue that the *eo nomine* provision for fresh mackerel is more specific than the general classification of fish in packages containing less than one-half barrel.

If this were the question actually involved in the case it would be easy of answer, for obviously such an *eo nomine* designation should control the assessment rather than a competing description of so general a character. The real issue in the case, however, does not relate to a comparison between these two classifications, but raises the question whether these importations actually fall within the *eo nomine* designation of fresh mackerel, as that term is used in paragraph 273. It is true that the appraiser reported the merchandise to be fresh mackerel, but he qualified this by the statement that they were also packed in ice. The question therefore arises whether mackerel when packed in ice can be fresh mackerel within the intentment of paragraph 273, *supra*.

This question was considered by the board in the Perry case, which arose under paragraph 261 of the act of 1897 (T. D. 26856). That paragraph was identical in language with paragraph 273 of the act of 1909. The following extract is taken from the decision, in which Fischer, General Appraiser, speaking for the board, sets out the conclusion therein reached:

Paragraph 261 reads as follows:

261. Fish, fresh, smoked, dried, salted, pickled, frozen, packed in ice or otherwise prepared for preservation, not specially provided for in this act, three-fourths of one cent per pound; fish, skinned or boned, one and one-fourth cents per pound; mackerel, halibut or salmon, fresh, pickled or salted, one cent per pound.

It is obvious that the first subdivision of this paragraph is broad enough to cover all fish (except perhaps living) in every conceivable condition, fresh or preserved, and that if the lawmakers had omitted all other reference to fish in the tariff all denizens of the deep would be dutiable under said subdivision. It follows that unless a particular kind of fish, whether considered with reference to its species or its condition or manner of preservation, is specifically provided for in other portions of the fish schedule, it is dutiable under the opening clause of paragraph 261.

With these considerations in mind, we shall apply ourselves to the question before us. There is here no dispute as to the facts. The fish are mackerel, halibut, and salmon, respectively; they are fresh, in the sense of not having been dried, smoked, salted, or pickled, and they are imported packed in ice. The question to be determined then is one of law—whether or not the provision for “mackerel, halibut, or salmon, fresh,” * * * includes such varieties of fish when imported frozen or packed in ice.

It seems to us that by the terms of the paragraph itself this query must be answered in the negative. Congress, by separately enumerating fish fresh, fish frozen, and fish packed in ice has differentiated the three classes of fish and that this is no mere redundancy of terms, but, on the contrary, is a legislative recognition of a distinction that is well attested by decisions of the courts and the board, by rulings of the Treasury Department, and by the testimony of numerous trade witnesses in other hearings before the board is indisputable.

* * * * *

We hold therefore that mackerel, salmon, and halibut, when frozen or packed in ice, are not dutiable as “mackerel, salmon, or halibut, fresh,” but fall within the terms of the opening clause of paragraph 261 and are dutiable at three-fourths of 1 cent per pound, as claimed. The protests are accordingly sustained and the decision of the collector reversed in each case.

A similar ruling of the board upon frozen halibut appears in T. D. 25430. It thus appears that under paragraph 261 of the act of 1897, which was identical with paragraph 273 of the act of 1909, it was held by the board that mackerel packed in ice were not “fresh mackerel” according to the meaning with which that term was used in the *eo nomine* provision of the paragraph.

The Perry case was appealed by the Government to the Circuit Court, District of Massachusetts, where the board's decision was affirmed upon the reasoning above set out. *United States v. Perry* (171 Fed., 303). In Notes on Tariff Revision (pp. 321, 322), the attention of Congress was called to the decision of the board in the two cases above cited, and the statement was made that an appeal in the Perry case was then pending in the Circuit Court. That appeal was decided in April, 1909, before the enactment of the tariff revision of 1909. No change, however, was made by Congress in the language of the corresponding paragraph of the revision of 1909.

The court is led by the reasoning of the board in the foregoing cases, and also by the implied approval thereof by Congress by the enactment of the corresponding paragraph in the act of 1909 in

identical terms, to the conclusion that the *eo nomine* designation of fresh mackerel appearing in paragraph 273 of the act of 1909 was not intended by Congress to cover or include such mackerel as were frozen or packed in ice, even though these also might in some senses be called fresh mackerel. Therefore the present issue is not to be decided by a comparison in specificity between the general description and the *eo nomine* designation above written, since the imported merchandise does not actually come within the terms of the *eo nomine* designation in question.

Under the act of 1897 the ruling of the board above cited caused the fish in question to be classified as fish frozen or packed in ice, dutiable under the first part of paragraph 261, which ruling sustained the claim made by the importers in the case. However, in the present case the protest is insufficient to invoke that classification under the corresponding provisions of the act of 1909, since as first above recited the only alternative claims made under the relevant paragraph are for assessment of the merchandise as fish, smoked, dried, salted, pickled, or otherwise prepared, or as fish skinned or boned. The present merchandise does not fall within any of these descriptions, and no claim was made in the protest for assessment under the provision for fish frozen or packed in ice. Indeed this claim seems to have been carefully avoided in the protest. Therefore the record does not present the question of a competition between the classifications of fish packed in ice with fish in packages containing less than one-half barrel. The collector's assessment must therefore be sustained and the board's decision to that effect is *affirmed*.

UNITED STATES *v.* CORNETT (No. 1347).¹

GOODS IN TRANSIT, UNITED STATES AND CANADA.

There was no compliance with customs regulations governing goods in transit; and, moreover, the goods here were taken out of the customs custody by the importer or his agent and into his own possession while in the United States. The law is mandatory that no refund of duties may be had in such a case as that.

United States Court of Customs Appeals, May 28, 1914.

APPEAL from Board of United States General Appraisers, Abstract 34568 (T. D. 34090).

[Reversed.]

William L. Wemple, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, of counsel; *Frank L. Lawrence*, special attorney, on the brief), for the United States.

Submitted on record by appellee.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

DE VRIES, Judge, delivered the opinion of the court:

In due course of transportation a bill of goods was carried from St. Stephens, New Brunswick, to St. Croix, New Brunswick, traveling

¹ Reported in T. D. 34531 (26 Treas. Dec., 944).

en route through the United States. The invoice, dated July 10, 1912, shows shipment from Montreal, Canada, to "Mr. Gardner Cornett, Vanceboro, Me., U. S. A." The memorandum, in the nature of a bill of lading, attached to the invoice names the same destination, and adds "Care of customs officer, Lowellton, Me.," and entry for consumption was made at Lowellton, Me., in July of the same year. There is an exhibit in the record which shows exportation from the port of Vanceboro, Me., August 6, 1912, of the merchandise "of which consumption entry was made at Lowellton, Me." Entry was also made at the Canadian port of McAdam, New Brunswick, September 24, 1912, of merchandise imported into this Province from the United States. The last entry of course was in the Canadian customs. Canadian duty was accordingly assessed and paid thereupon.

It thus appears that this shipment of merchandise was invoiced to Vanceboro, Me., U. S. A., was entered for consumption at Lowellton, Me., on the border line, and passed out of the customs custody into the custody of the owner or importer or his agent. It further appears from the record that the importation into the United States was made in one car, to wit, C. P. 91758, and the exportation into Canada was in another car, C. P. 39606.

Protest was made claiming clerical error. The Board of General Appraisers sustained the protest in the statement as follows:

The record as it stands before us clearly shows that the protestant was not intending to and did not import any merchandise, that the merchandise in question did not enter the United States for the purpose of consumption, but only in transit, and that the entry by the Canadian Pacific Railway was made by mistake.

The statutory difficulties which confront us in the determination of the relief to be afforded under the law in this case are several. Section 2979 of the Revised Statutes affords a form of relief from duties upon goods imported into the United States with the intent of exporting them therefrom in the following language:

SEC. 2979. If the owner, importer, consignee, or agent of any merchandise on which the duties have not been paid, shall give to the collector satisfactory security that the merchandise shall be landed out of the jurisdiction of the United States, in the manner required by the laws relating to exportations for the benefit of drawback, the collector and naval officer, if any, on an entry to reexport the same, shall upon payment of the appropriate expenses, permit the merchandise, under the inspection of the proper officers, to be shipped without the payment of any duties thereon.

This record does not disclose, and on the contrary the facts stated controvert the fact that the importer or his agent took any steps whatsoever to avail themselves of the benefit of this provision of the law.

The more specific and applicable provision is that of section 3005 of the Revised Statutes (as amended in 1900), which provides for the transportation of merchandise from one point in the British Provinces to another point within said provinces as well as through

other adjacent territory through the United States. The provision reads:

Sec. 3005. (As amended 1900.) All merchandise arriving at any port of the United States destined for any foreign country may be entered at the customhouse, and conveyed, in transit, through the territory of the United States, without the payment of duties, under such regulations as to examination and transportation as the Secretary of the Treasury may prescribe.

The benefit of that provision can be had, however, only upon compliance with the customs regulations made thereunder. These are set forth in the Customs Regulations of 1908, articles 445-447. There is no showing in this record, and there is no pretense made, that the importer or his agent in anywise complied or attempted to comply with these requirements. He is, therefore, not entitled to the benefit of this provision.

Moreover, it incontrovertibly appears in the record that these goods were taken out of the customs custody by the importer or his agent and into his possession while in the United States. The provisions of the Revised States are mandatory that in such case no refund of duties shall be had. Section 3025 in so far as pertinent reads:

Sec. 3025. No return of the duties shall be allowed on the export of any merchandise after it has been removed from the custody and control of the Government. * * *

Reversed.

UNITED STATES v. ELGIN NATIONAL WATCH CO. (No. 1382).¹

RECONSTRUCTED RUBIES.

The merchandise here is watch jewels made of reconstructed rubies. They can not, it would seem, be devoted to any other use or purpose except as jewels for watches. They are the more specifically provided for by paragraph 192, tariff act of 1909.

United States Court of Customs Appeals, May 28, 1914.

APPEAL from Board of United States General Appraisers, Abstract 35123 (T. D. 34307).

[Affirmed.]

William L. Wemple, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, on the brief), for the United States.

Submitted on record by appellee.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

BARBER, Judge, delivered the opinion of the court:

The single question here is whether the provision in paragraph 449 of the tariff act of 1909 for "imitation precious stones, including pearls and parts thereof, for use in the manufacture of jewelry, doub-lets, artificial, or so-called synthetic or reconstructed pearls and

¹ Reported in T. D. 34532 (26 Treas. Dec., 946).

parts thereof, rubies, or other precious stones, 20 per cent *ad valorem*," under which the merchandise hereinafter described was assessed, should govern its classification or whether it should be classified under the provision in paragraph 192 of the same act for "all jewels for use in the manufacture of watches, * * * 10 per cent *ad valorem*," as claimed by the importer and held by the Board of General Appraisers.

Upon the hearing of the protest by the board, an examiner at the port of Chicago, where the merchandise was entered, testified on behalf of the importer. The Government was represented by its special attorney, but called no witnesses. Before being sworn the examiner said in substance, as representing the appraiser, he would admit that the claim in the protest was well founded, and that similar merchandise was now being passed as claimed by the importer in this case. This fact was referred to in the board's opinion as making in favor of the importer's claim. We can not, however, consider this as an admission against the Government, because there is nothing to show either that the examiner or appraiser represented the Government at the hearing or had authority to make such an admission.

The merchandise was returned by the appraiser as reconstructed precious stones, and was described by him as reconstructed ruby watch jewels. The collector evidently construed the quoted part of paragraph 449 as providing for reconstructed or synthetic rubies or other precious stones without limitation as to use or otherwise.

The examiner testified before the board that he was familiar with the merchandise, and that it was "watch jewels" made of reconstructed precious stones. We assume that the merchandise is watch jewels made of reconstructed rubies. This seems to be the purport of the board's opinion, and the Government claims such to be the fact.

The Government contends that the provision for reconstructed rubies in paragraph 449 *eo nomine* describes the merchandise and is more specific than the term "all jewels for use in the manufacture of watches" in paragraph 192. The importer submits upon the record and the board's opinion.

It is urged by the Government that the provision for "all jewels for use in the manufacture of watches" was in prior tariff laws; that a specific reference to reconstructed rubies was first made in the act of 1909, as a result of litigation over the classification of such merchandise; and that it must be presumed that Congress thereby designed to withdraw from the then existing provision for "all jewels for use in the manufacture of watches," such as were made of reconstructed rubies.

A reference to preceding tariff laws discloses that in the acts of 1890 and 1894 jewels to be used in the manufacture of watches were

given free entry, while in the act of 1897 the identical provision was made therefor that appears in paragraph 192, above quoted. The provision in the act of 1909 for reconstructed rubies and other like articles appears to be the first legislative action relating directly to that subject. Prior thereto reconstructed or synthetic rubies seem to have been held by the board to be dutiable either directly or by similitude as imitation precious stones. G. A. 5394 (T. D. 24601), G. A. 6336 (T. D. 27278), and G. A. 3317 (T. D. 16729). So far as we can learn, these cases did not involve reconstructed ruby watch jewels.

It may be assumed that Congress in the act of 1909 undertook to settle the classification of these synthetic or reconstructed stones of the character named in paragraph 449, the classification of which in a measure was unsettled and had been somewhat in litigation. But the legislative history we have referred to indicates that jewels for watches, not only in prior tariff laws but in the act of 1909 also, were considered as entitled to preferential treatment, as compared with other articles of the same material not designed for use as watch jewels. The specific mention of synthetic or reconstructed rubies in the act of 1909 does not, therefore, in our opinion, signify any intention on the part of Congress to depart from its long-continued favorable treatment of watch jewels. It is safe to assume that not all synthetic or reconstructed rubies are used for watch jewels, and hence the provision for such articles finds scope for application if watch jewels of reconstructed rubies are excluded therefrom.

The two paragraphs of the act of 1909, for the purposes of this case, should, we think, be construed together and as if reading substantially as follows: "Reconstructed rubies shall be dutiable at twenty per centum ad valorem, provided that all jewels composed of reconstructed rubies for use in the manufacture of watches shall nevertheless be dutiable at ten per centum ad valorem."

The merchandise here is watch jewels made of reconstructed rubies. Just how far they have been processed to fit them for that use the evidence does not show, except that the witness testified they were "watch jewels." The official samples before us are minute articles, each having a hole in the center presumably designed to receive the mechanism of the watch which is appropriate therefor. The record does not suggest, and it is not claimed, that they are suitable for any other purpose, and we think their condition and the witness's statement that they are "watch jewels" support the conclusion that they can not in their present condition be practically devoted to any other use or purpose.

We think these watch jewels are more specifically provided for in paragraph 192 than in paragraph 449. The cases of *Magone v.*

Heller (150 U. S., 70) and *Athenia Steel & Wire Co. v. United States* (1 Ct. Cust. Appls., 494; T. D. 31528) may be referred to in this connection.

We have carefully examined the cases cited by the Government in support of its contention here and are unable to find therein any reasoning or adjudication that requires a different disposition of this case than that already indicated.

The judgment of the Board of General Appraisers is *affirmed*.

COHN & ROSENBERGER *v.* UNITED STATES (No. 1387).¹

IMITATION PEARL BEADS AND IMITATION PEARLS.

The provision in the tariff act of 1909 for imitation pearl beads is more specific than that for imitation pearls and the several provisions taken together indicate a legislative purpose to include within paragraph 449 of that act only such imitation pearls for use in the manufacture of jewelry as are not also imitation pearl beads. *Lorsch & Co. v. United States* (5 Ct. Cust. Appls., 93; T. D. 34132).

United States Court of Customs Appeals, May 28, 1914.

APPEAL from Board of United States General Appraisers, G. A. 7561 (T. D. 34415).

[Affirmed.]

Hatch & Chute (Walter F. Welch of counsel) for appellants.

William L. Wemple, Assistant Attorney General (Leland N. Wood, special attorney, of counsel), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MARTIN, Judge, delivered the opinion of the court:

The merchandise covered by the present appeal consists of certain loose or loosely strung imitation pearl beads suitable and intended for use in the manufacture of jewelry. The collector assessed duty thereon at the rate of 35 per cent ad valorem under the provision for "imitation pearl beads" contained in paragraph 421 of the tariff act of 1909. The importers duly filed their protest against the assessment, claiming the articles to be dutiable at 20 per cent ad valorem under the provision for "imitation precious stones, including pearls and parts thereof, for use in the manufacture of jewelry" contained in paragraph 449 of the same act. The protest was submitted upon evidence to the Board of General Appraisers and was overruled, from which decision the importers now appeal.

At the hearing before the board the record in the case of *Lorsch & Co. v. United States* (5 Ct. Cust. Appls., 93; T. D. 34132) was incorporated into the present record, and the same is now before the court.

¹ Reported in T. D. 34533 (26 Treas. Dec., 949).

The following are the relevant parts of the two paragraphs which thus stand in competition with one another:

421. Beads and spangles of all kinds, including imitation pearl beads, not threaded or strung, or strung loosely on thread for facility in transportation only, thirty-five per centum ad valorem; * * *.

449. * * * Imitation precious stones, including pearls and parts thereof, for use in the manufacture of jewelry, * * * twenty per centum ad valorem.

In comparing these two tariff provisions it should be noted that each contains an *eo nomine* enumeration, one being imitation pearl beads, the other being imitation pearls. It is true that not all imitation pearls are included within the latter classification, but only such as are for use in the manufacture of jewelry. It is equally true that not all imitation pearl beads are included within the prior classification, but only such as are loose or strung loosely on thread for facility in transportation only. In each case therefore the classification for duty contains a limitation engrafted upon the *eo nomine* enumeration; but these secondary limitations relate to certain incidents of the articles rather than to their characteristics, and furnish in this case no basis for a comparison in specificity. That comparison therefore depends upon the *eo nomine* designations of the respective articles, one of which is imitation pearls while the other is imitation pearl beads. It is needless to add that in this comparison "imitation pearls" is the genus and "imitation pearl beads" is the species.

The court therefore concludes that the provision for imitation pearl beads is more specific than that for imitation pearls, and that the several provisions taken together indicate a legislative purpose to include within paragraph 449 only such imitation pearls for use in the manufacture of jewelry as are not also imitation pearl beads. It appears from the record that imitation pearls are sometimes imported for use in the manufacture of jewelry in other forms than beads, and therefore the present construction does not deprive that provision of practical operation.

The present question is identical with that decided by this court in the Lorsch case, *supra*, and it is sufficient here to refer to that decision for a more complete exposition of the subject. The appellants seek to distinguish the two cases by suggesting that in the Lorsch case it was not proved that the imitation pearl beads were for use in the manufacture of jewelry. The record of that case, however, discloses that this claim was made by the importers and was sustained by testimony, and the decision of the court proceeded upon that theory. The language of the decision admits of no other construction than this, for if the articles in question had not been for use in the manufacture of jewelry there would have been no occasion for comparing the two classifications in point of specificity.

The case of *United States v. American Bead Co.* (3 Ct. Cust. Appls., 509; T. D. 33166) is cited by appellants' counsel as an authority in

support of their present claim. The following, however, is the description of the merchandise which appellants thus refer to:

Class 5, illustrated by importers' Nos. 5528, 5530, 5540, 5554, 5555, and 5557, consists of imitation precious stones, some oval and others in the form of hearts, the upper parts of which have a small shoulder pierced through in the process of molding, some imitation cameos with two holes pierced in the sides, and other articles not in the form of beads, some drilled and others without holes; all this class being suitable for use in the manufacture of jewelry and assessed for duty at 35 per cent ad valorem under paragraph 421 (p. 511).

Concerning these goods the court said:

The only items which have given us any doubt are some small pendants, the material of which is pierced and capable of being strung on thread or wire. These appear in various forms. And also some pear-shaped articles pierced lengthwise. Some of these articles might be used as beads, but the evidence shows that they were intended for use in the manufacture of jewelry. They are similar to the items considered in class 1, except that they have no attachment which admits of their being clasped to a necklace in their present form. They would appear to require some further process of manufacture. Giving the importer the benefit of any doubt there may be as to this classification, we affirm the decision of the board as to all items covered by classes 3 and 5 (p. 515).

It appears therefore from the foregoing description that the goods in question were not actually beads, although some of the articles might be used as beads, and that they were intended for use in the manufacture of jewelry. This case was of course before the court when the Lorsch case was decided and was not regarded as applicable to the point now in question.

The decision in the Lorsch case, *supra*, is approved, and in conformity therewith the decision of the board is *affirmed*.

THOMPSON v. UNITED STATES (No. 1367).¹

RESIDENTS RETURNING FROM ABROAD.

The appellant, though born in the United States, lived in England for many years with her father, who, at her birth and continuously thereafter, was a resident of England. She married in London a citizen of the United States. Voyaging to the United States after her marriage, she is not to be deemed a resident of the United States, returning thereto, but a person arriving in the United States, and under paragraph 642, tariff act of October 3, 1913, her personal effects were entitled to entry free of duty.

United States Court of Customs Appeals, June 1, 1914.

APPEAL from Board of United States General Appraisers, G. A. 7553 (T. D. 34354).

[Reversed.]

James F. Curtis for appellant.

William L. Wemple, Assistant Attorney General (Charles E. McNabb, assistant attorney, of counsel), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

DE VRIES, Judge, delivered the opinion of the court:

This appeal brings here for determination the question of the dutiability or exemption from duty of certain wearing apparel, articles of

¹ Reported in T. D. 34534 (26 Treas. Dec., 951).

personal adornment, and similar personal effects under the provisions of paragraph 642 of section 1 of the tariff act of October 3, 1913, which for more exact statement of the issue as well as reference may be quoted:

642. Wearing apparel, articles of personal adornment, toilet articles, and similar personal effects of persons arriving in the United States; but this exemption shall include only such articles as were actually owned by them and in their possession abroad at the time of or prior to their departure from a foreign country, and as are necessary and appropriate for the wear and use of such persons and are intended for such wear and use, and shall not be held to apply to merchandise or articles intended for other persons or for sale: *Provided*, That in case of residents of the United States returning from abroad all wearing apparel, personal and household effects taken by them out of the United States to foreign countries shall be admitted free of duty, without regard to their value, upon their identity being established under appropriate rules and regulations to be prescribed by the Secretary of the Treasury: *Provided further*, That up to but not exceeding \$100 in value of articles acquired abroad by such residents of the United States for personal or household use or as souvenirs or curios, but not bought on commission or intended for sale, shall be admitted free of duty.

Mary Van Alen Thompson, the appellant and claimant, arrived at the port of Boston on the steamship *Arabic* October 16, 1913, from England, bringing with her divers articles concededly of the above enumerated classes. Duty was assessed thereupon by the collector of customs at Boston, whose decision was upon protest affirmed by the Board of General Appraisers, and claimant appeals to this court.

The evidentiary as distinguished from the probative facts are not seriously controverted. Mrs. Thompson is the daughter of James J. Van Alen. She was born in the United States at a time when her father was a resident of and maintaining his permanent home in England. He has continuously resided abroad ever since, and whenever he has entered this country has done so as a nonresident and been passed as such by the customs officials.

At the age of 6 months this daughter was taken abroad. Her visits to this country were infrequent, of short duration, and usually of the character and no different from the visits made by many residents of this country abroad. They may be enumerated briefly: During the years 1886 to 1896, which were years of her minority, she lived continuously abroad with her father and in school in Europe. She did not visit this country during that period of 10 years. In 1896 she made her debut in society in Newport, coming to this country for that purpose and remaining here but four months. She did practically the same in 1897. In 1898 and 1899 she did not visit this country. In 1900 she visited this country for a period of two or three months during the summer season at Newport. Since 1907 she has made but three visits to this country, to wit, 1909, 1910, and 1911, each of which lasted for but two months during the summer season. She was not in this country during 1912 or 1913 until her landing at Boston last October. So that it appears that during 28 years she had actually spent but 23 months in this country and that as a visitor, and, so far as

the record speaks, without any fixed or permanent abode, always returning after these short visits to England. During the several visits to this country she always declared for customs purposes as a nonresident and was so passed by the customs officials. In 1903 her father purchased Rushton Hall, a large estate in England, and from 1903 to 1906 this daughter lived with her father upon that estate, though not in Rushton Hall proper, which was undergoing improvements. In 1907 she and her father moved into Rushton Hall, where they have since lived, keeping the same as a permanent home, the daughter keeping house for the father, the mother having died some years previously. About 1907 Mr. Van Alen gave a house in New York City to the daughter. She never lived in this house, however, finally disposing of it by sale about 1912. On September 24, 1913, Miss Van Alen married Griswold A. Thompson. They were married in London. Mr. Thompson shortly thereafter, owing to the serious illness of his father in New York City, returned thereto, Mrs. Thompson remaining in England. Mr. Thompson is a citizen of the United States and a resident of New York City. Mrs. Thompson followed him to the United States later, but testified that when she came to this country she entertained a hope of returning to England to live at some future time, and in that view had left a great portion of her furniture, linen, and plate over there.

The Board of General Appraisers found as a fact in the case that up to the time of her marriage Mary Van Alen Thompson was a resident of England. We think this finding of the board is amply supported by the testimony. During her minority at least she was not only resident but domiciled in England, her residence and domicile following that of her father.

There is no question here that the articles in question were such as are necessary and appropriate and intended for the use and wear of a person of the standing and financial means of the appellant and were not intended for others or for sale.

The board predicated its decision entirely upon the proposition of the residence of the appellant, reasoning as stated in their opinion:

We reason from this rule that the protestant in this case ceased to be a resident of England in any event at the moment she began her return to the United States, and that at the same time she ceased to be a nonresident and became a resident of the United States, because having entered into the marital relation with a resident of the United States and begun her removal thereto, she by her own act constituted herself a resident of this country.

While there seems to be no decided case in this country fixing the exact time when the residential status of a married woman becomes that of her husband, treating the word "residence" as synonymous with "domicile," as we think we must in this case, the English as well as the French law seems to have been fairly well settled for many years. * * *

There may be serious question whether "residence" and "domicile" are always synonymous. While this may have been often so

held it is not always true, and the better rule of legal guidance would seem to give superior influence to the particular statute and its language, its history and reasons prompting its enactment. (*Barney v. Oelrichs*, 138 U. S., 529, 533.) Nevertheless, we are not prepared to hold, nor, in our view of the case, is it deemed essential to decide, that Miss Van Alen did or did not by her marriage to Mr. Thompson *ipso facto*, or by such acts done or intentions formed thereafter and before her arrival at the port of Boston, become constructively a resident of the United States.

The board having determined this issue against appellant decreed that conclusive of the case without deciding another and we think more serious and decisive issue presented.

A comprehensive view of the statute is persuasive almost to demonstration that Congress intended to and did effectively include within its purview *all* "persons" arriving in the United States and by its first proviso excepted from its purview only "residents of the United States *returning from abroad*," and by the second proviso "*such residents*," adverting to the limited class expressed, and expressed only in the next preceding or first proviso. We are, therefore, directly confronted with the inquiry as to what persons constitute "residents of the United States *returning from abroad*," and, is this appellant such, as that enumeration is employed by Congress? If not, there seems no escape from the deduction that she is within the broad generalization of all "persons" as that term is used in the purview of the statute.

Assuming for the purposes of decision without deciding that Mrs. Thompson by virtue of her marriage became constructively a resident of the United States, was she a "resident of the United States *returning from abroad*?" We think not. The word "returning," participle of "return," is defined by the leading lexicographic authorities as connoting a previous departure from and return to the place of commencement of the journey.

Webster defines "Return:"

To turn *back*; to go or come again to the same place or condition.

Worcester states:

Return: The act of returning; the act of going or coming *back*.

The Standard Dictionary likewise says:

Return: To cause to take again a former position; put, carry, or send *back*, as to a former place or holder.

The Century Dictionary and Cyclopædia defines "Return:"

1. To turn *back*. 2. To come *back*; come or go back to a former place or position; as, to return home.

The words "residents returning to the United States," therefore, lexicographically connote of necessity a journey in completion of a trip originally undertaken by departure from this country by residents thereof.

Mrs. Thompson, being a resident of England, had for many years departed therefrom and returned thereto. On such trips she was a *resident of England returning* thereto. When she became Mrs. Thompson, however, and be it assumed thereby a resident of the United States, and undertook this journey she was not a resident of the United States *returning thereto*, for she was not returning to the United States but undertaking another and a new journey to this country after having last returned *therefrom* to England some three years previously.

Counsel for both sides have ably exhausted the authorities legally defining the word "returning." The precedents apparently being so contradictory would seem to indicate hopeless conflict. Much of this apparent difference, however, can be reconciled by bearing in mind that in most cases a different statute or class of statutes was construed and the conclusion in the individual cases wrought out of the language of the precise act. So that while as precedents these decisions are of small guidance here as such, these opinions instruct that each such case must be determined upon the language of the statute under consideration. Accordingly, proceeding in respect to that sapient and salutary rule, this statute bears internal evidences of the congressional mind at enactment which leaves little or no question of the legislative intent—the one cardinal and controlling inquiry.

Did Congress in this act intend by the words "residents of the United States returning from abroad" to include journeys by residents originally undertaken from abroad to and not from the United States?

First. The word "returning" in the proviso is contrasted with the word "arriving" in the purview of the paragraph. All residents "returning" are likewise residents "arriving," and, if Congress had no purpose of distinguishing the two, the common, natural meaning of the former would have more adequately expressed the purpose than the more narrow, natural meaning of the latter. If we observe the spirit of the familiar rule that effect must be given to all the language of the act, we must ascribe this obvious and naturally different meaning to these different words confining the latter as indicated. See in *Bradley Martin, jr., v. United States* (1 Ct. Cust. Appls., 134; T. D. 31185), wherein this court pointed out the contrasted use of these words as indicative of their relative scope.

Second. The phrase is coupled in the legislative mind and by the statute related to "wearing apparel * * * *taken by them out of the United States* to foreign countries * * *." What words could more definitely demonstrate that when Congress spoke of residents returning it contemplated and intended its language to relate to those commencing a journey in the United States which journey would be completed by such "residents of the United States returning from abroad."

If the several constituent conditions expressed in this proviso must concur before it becomes operative, which would seem undebatable, then it could only operate in favor of or against those who were not only residents of the United States, but who commencing the journey here had "taken" such goods "by them out of the United States to foreign countries," and, further, who had in so doing complied with the Treasury regulations. Not only does "*taken by them* out of the United States" expressly limit and confine the application of this proviso to those residents actually commencing a journey in the United States, but it certainly also indicates that in this enactment Congress had in mind only those residents "returning" who had commenced the journey in this country. Taken by them. By whom? By a resident of the United States, *ex necessitate*, a resident not constructively such at the time the return journey was commenced, but actually such at the time the goods were taken from and the journey commenced in this country. Let us read further. This license is only granted upon compliance with the regulations promulgated by the Secretary of the Treasury and limited to residents of the United States. So that by the very terms and conditions of this proviso its application is limited to merchandise taken out of the country by one who is at the time of the taking a resident of the United States and *as such* can comply with the pertinent Treasury regulations. The whole framework and all the conditions of this proviso being expressly limited in its operation to residents of the United States who must be such at the time of the commencement of the journey, it seems that it can have, and was intended by Congress to have, no application to "persons arriving in the United States," including residents who are not returning but likewise arriving.

So the careful wording of the next proviso likewise argues. Congress cautiously confines its scope to "such residents," not only confirming the limitations of the first proviso, but emphasizing the amplitude of the purview of the paragraph.

The distinction between the case of a resident of the United States who as such a resident proceeds therefrom abroad continuing the while such a resident and returning to the United States at frequent intervals and a case such as this where the claimant was not returning to the United States but undertaking a journey thereto and who was not a resident of the United States, save, if at all, by legal construction, an effective factor in the consummation of which is the journey itself, is shown in *Bache v. United States* (4 Ct. Cust. Appls., 414, 415; T. D. 33852). Mrs. Bache was a resident of the United States at the origin of her journey. The trip commenced in this country and she was in fact returning thereto in completion of a trip earlier undertaken. The distinction between that case and this is

obvious and accords with the views of the Supreme Court of the United States construing the word "return" in a recent case. The court said:

The indictment charges that the defendant did "unlawfully and knowingly return one Will Gordon and one Mose Ridley to a condition of peonage, by forcibly and against the will of them, the said Will Gordon and the said Mose Ridley, returning them, the said Will Gordon and the said Mose Ridley, to work to and for Samuel M. Clyatt."

Now a "return" implies the prior existence of some state or condition. Webster defines it "to turn back; to go or come again to the same place or condition." In the Standard Dictionary it is defined "to cause to take again a former position; put, carry, or send back, as to a former place or holder." A technical meaning in the law is thus given in Black's Law Dictionary: "The act of a sheriff, constable, or other ministerial officer, in delivering back to the court a writ, notice, or other paper."

It was essential, therefore, under the charge in this case to show that Gordon and Ridley had been in a condition of peonage, to which, by the act of the defendant, they were returned. We are not at liberty to transform this indictment into one charging that the defendant held them in a condition or state of peonage, or that he arrested them with a view of placing them in such a condition or state. The pleader has seen fit to charge a return to a condition of peonage. The defendant had a right to rely upon that as the charge, and to either offer testimony to show that Gordon and Ridley had never been in a condition of peonage or to rest upon the Government's omission of proof of that fact. *Clyatt v. United States* (197 U. S., 207, 219).

It seems to us, therefore, that appellant is not a resident *returning* within the proviso, but a person arriving in the United States within the purview of the statute quoted and as such entitled to have her goods passed free of duty.

Reversed.

MERCK & Co. v. UNITED STATES (No. 1299).¹

1. "CRUDE."

Whether an article is crude is to be determined not by the processes which brought it into being, but by the additional processes to which it is submitted after its creation in order to fit it for its chief or only use.

2. PARAGRAPH 41, TARIFF ACT OF 1909.

The opium of the importation was not "dried," as that term is used in paragraph 41, nor powdered nor otherwise advanced in condition, and it was properly dutiable as opium, crude or unmanufactured, and not adulterated, containing 9 per cent and over of morphia.

United States Court of Customs Appeals, June 1, 1914.

APPEAL from Board of United States General Appraisers, G. A. 7501 (T. D. 33788).

[Reversed.]

Comstock & Washburn (Charles A. Darius of counsel) for appellants.

William L. Wemple, Assistant Attorney General (Charles E. McNabb, assistant attorney, of counsel), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

SMITH, Judge, delivered the opinion of the court:

Opium in bricks and cakes, imported at the port of New York on March 5, 1910, and classified by the collector of customs as opium

¹ Reported in T. D. 34549 (26 Treas. Dec., 902).

"advanced beyond the crude state by drying, either artificially or naturally," was assessed for duty at \$2 per pound under that part of paragraph 41 of the tariff act of 1909 which reads as follows:

41. Opium, crude or unmanufactured, and not adulterated, containing nine per centum and over of morphia, one dollar and fifty cents per pound; opium of the same composition, dried, powdered, or otherwise advanced beyond the condition of crude or unmanufactured, two dollars per pound; * * *.

The importers protested that the merchandise was opium crude and unmanufactured and therefore dutiable at \$1.50 per pound under the first clause of said paragraph 41. The Board of General Appraisers overruled the protests and the importers appealed.

Some of the merchandise is known as Persian opium and some of it as Turkish opium, the Persian being imported in the form of bricks and the Turkish in lumps or cakes of irregular form. As appears from the uncontradicted evidence in the record, opium is the inspissated juice of the poppy plant, which is secured by incising the capsules or bulbs of a species of poppy while the capsule or bulb is still unripe and the juice is running abundantly. Through the incisions made in the capsule or bulb the juice or sap oozes out and is later scraped off by the opium farmer into small vessels, from which it is subsequently transferred into larger receptacles. Just as taken from the plant the juice contains from 40 to 50 per cent of moisture, which must be very materially reduced by evaporation or other means before it reaches the status of the opium of commerce. In the case of Turkish opium this purpose is accomplished to some extent by extraneous material, which finds its way into the juice and absorbs the moisture. The surplus moisture in Persian opium is eliminated by spreading the juice on boards and keeping a new surface constantly exposed to the sun until the product has been brought to a proper consistency by evaporation—that is to say, to the state of an inspissated juice. While still warm from the heat of the sun and to some degree still soft, the material is cut into the form of bricks and hardened by putting it aside to cool. To preserve their shape and to prevent any further evaporation the bricks are then wrapped in paper, and in that condition they are known as Persian opium.

Persian opium as imported does not usually contain more than 10 per cent of moisture. The moisture in Turkish opium sometimes runs as high as 28 per cent, but usually runs from 15 to 20 per cent. The valuable content of opium is morphine, and as the percentage of that alkaloid in Persian opium is low and in Turkish opium high, the moisture in the Persian must of necessity be reduced to a much lower percentage than that of the Turkish product in order to secure the minimum of 9 per cent morphine prescribed for crude unmanufactured opium. For the making of Persian opium far more elaboration and

manipulation are therefore required than for the manufacture of Turkish opium. Barring the spontaneous evaporation which results from exposure, the elimination of surplus moisture from Turkish opium is apparently left to the absorbent action of the extraneous matters mixed with the juice either designedly or through careless collection. Such a course, however, can not be pursued in the manufacture of Persian opium, as the weight of the absorbents would keep down the percentage of morphine, and consequently the Persian exporter is forced to dry out the collected juice by keeping a new surface constantly exposed to the rays of the sun. Due to the difference in the drying processes, Persian is cleaner and purer than Turkish opium, but it is evident that whether one process or another is employed the particular method used has no other purpose and accomplishes no other object than to bring the juice of the poppy to the status in which it is first known to commerce as opium.

We think that it may be admitted that the processes employed in making the opium in controversy were manufacturing processes and that opium may be considered as a manufactured product. Nevertheless, unless the opium once produced was subjected to further treatment or manipulation after having been brought to the state when it first became commercial opium, there is no escape from the conclusion that it was crude and unmanufactured opium within the meaning of the first clause of paragraph 41, otherwise no effect could be given to that provision. In the matter of *Leggett* (T. D. 21804); *In re Peabody* (T. D. 25443); *United States v. Merck* (66 Fed., 251); *Littlejohn v. United States* (119 Fed., 483); *United States v. Continental Color & Chemical Co.* (2 Ct. Cust. Appls., 165; T. D. 31679); *United States v. Sheldon* (2 Ct. Cust. Appls., 485, 487-488; T. D. 32245); *United States v. Danker* (2 Ct. Cust. Appls., 522, 524; T. D. 32251).

The term "crude" is not confined to something which is in a natural or raw state—something which has not been processed or prepared. "Crudeness" is a relative term, and whether an article is crude is to be determined not by the processes which brought it into being, but by the additional processes to which it is submitted after its creation in order to fit it for its chief or only use. *Roessler & Hasslacher Chemical Co.* (94 Fed., 822); *Leber & Meyer v. United States* (135 Fed., 243); *United States v. Danker, supra*.

Opium is imported into this country almost exclusively for the purpose of manufacturing morphine and other medicinal preparations, and it is clear from the evidence in this case that neither the Persian opium nor the Turkish opium in the condition in which imported is fit for use as a medicine or for the manufacture of morphine. The opium here involved is therefore crude and unmanufactured, not

only because its condition has not changed since it became opium, but because it must be subjected to further manufacture to fit it for use. (See cases above cited.)

In order that opium may be used for the preparation of medicines or to make morphine it must be, as appears from the evidence, either granulated or pulverized. (See also United States Pharmacopœia.) And to granulate it or pulverize it all the witnesses are agreed that the opium must be cut into slices and then dried out in an oven at a temperature not to exceed 85° C. As a result of this treatment the slices become dry and hard, and they are then put through a mill, which granulates them. If a powder is required the granulated opium is again dried in an oven or kiln and is brought to the condition in which it may be reduced to a powder by grinding.

When the Congress provided in the second clause of paragraph 41 for opium not adulterated, containing 9 per cent and over of morphine, dried or powdered, we think it had in mind opium subjected to some such manipulation as that just described. In this opinion we are confirmed by the history of the legislation. Paragraph 43 of the tariff act of 1897 provided for "opium, crude or unmanufactured, and not adulterated, containing nine per centum and over of morphia," and made no provision at all for dried or powdered opium or for opium advanced in condition. Under this provision it was sought to subject powdered opium to the duty of \$1 per pound imposed on opium crude or unmanufactured by that paragraph, but it was held by the Circuit Court of Appeals in *Merck v. United States* (151 Fed., 14) that powdered opium was neither crude nor unmanufactured, and that, by powdering, the original product had undergone a treatment which destroyed its identity and produced another and more valuable article with a new use and a new commercial signification. The court accordingly held that powdered opium was not within the terms of paragraph 43 and was a drug advanced in value or condition by refining, grinding, or other process, and therefore dutiable under paragraph 20.

In the tariff act of 1909, as we have already seen, provision was made for opium, dried or powdered, or otherwise advanced in condition, and we think that that provision was intended to meet the defect in the law made apparent by the *Merck* case, and to provide by special designation for opium which, after it became opium, had been subjected to the manufacturing processes of drying or powdering or to other advancement. The view that dried opium means opium which has been subjected to a drying process after it is manufactured is strongly supported by the testimony of Cortlandt St. John, a Government witness and a dealer in opium for over 40 years. This witness testified that the trade made a distinction between dry opium and dried opium, and that dried opium was recognized in the

trade as opium which had been dried down to about as much moisture as it would lose, and that this condition was brought about by artificial drying—that is to say, by placing the opium in a kiln, oven, or drying room. He further stated that dried opium was imported in small pieces and in a comminuted form.

To hold that the new provision incorporated in the tariff act of 1909 was intended to cover all opium subjected to a drying process in the course of its manufacture would practically leave the first clause of paragraph 41 with nothing upon which to operate, inasmuch as in the production of all opium some drying is necessary. We must, therefore, hold that the opium under consideration was not dried as that term is used in paragraph 41 of the tariff act of 1909. We find that the opium under consideration, after it became opium, was neither dried, powdered, nor otherwise advanced in condition, and that it is properly dutiable at \$1.50 per pound as opium, crude or unmanufactured, and not adulterated, containing 9 per cent and over of morphia.

The decision of the Board of General Appraisers is *reversed*.

UNITED STATES *v.* AMERICAN EXPRESS CO. (No. 1334).¹

1. "RATE AND AMOUNT OF DUTIES."

The words "rate and amount of duties" occurring in the statute define a class of decisions against which protest will lie for any cause distinctly and specifically stated and are not a limitation of the grounds upon which a collector's decision can be assailed.

2. BOARD'S JURISDICTION TO ORDER REAPPRAISEMENT.

The board has jurisdiction to hear and determine protests against a collector's decision assessing a rate and amount of duty upon imported merchandise on the ground that the appraisement is irregular or invalid, and a demand for a reappraisement operates after the manner of supersedeas.

3. PAROL TESTIMONY.

The parol testimony here does not contradict but merely supplies an omission, and the rule against its admission, in the absence of any statutory or regulative requirement of a record, will not be enforced.

United States Court of Customs Appeals, June 1, 1914.

APPEAL from Board of United States General Appraisers, G. A. 7512 (T. D. 33962.)

[Affirmed.]

William L. Wemple, Assistant Attorney General (*William A. Robertson*, special attorney, of counsel), for the United States.

Submitted on record by appellee.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

DE VRIES, Judge, delivered the opinion of the court:

This appeal relates to an importation made at the port of New York. Due appraisement of the merchandise was had and the col-

¹ Reported in T. D. 34550 (26 Treas. Dec., 995).

lector proceeded to decide the proper rate and amount of duties and liquidated the entry accordingly. The protestant thereupon in due time filed a protest alleging that he had duly filed an appeal to reappraisal before a single general appraiser, which was undecided, and that therefore the decision of the collector was void, having been had during the pendency of said claimed appeal. At the hearing before the board, parol testimony was admitted to prove that the appeal to reappraisal was filed. It was so testified by the protest clerk of the importer. The protest clerk of the collector testified he had no recollection of such and produced his records, which showed that no entry of such appeal had been recorded. The board found as a fact that the appeal to reappraisal had been filed, sustained the protest, and ordered: "And the collector is directed to transmit all the papers to the Board of General Appraisers for reappraisal." The Government appeals, specifying as error, first, that the board had no jurisdiction of the protest; and, secondly, that parol evidence was not admissible to establish the filing of such a reappraisal appeal; and, thirdly, that the board was without power to make the order directing the collector to forward the papers for reappraisal. Accuracy will be subserved by quoting from the Government brief, wherein, referring to the said order of the board and its jurisdiction in the premises, it is stated:

The United States claims that in making such an order the board entirely exceeded its jurisdiction, and that the issue as actually made in the case at the trial has not raised any question as to the "*rate and amount of duties* chargeable upon imported merchandise," nor any question of "*fees, charges, or exactions other than duties*" (subsec. 14, sec. 28, act of 1909). On the contrary, the order of the board is, in effect, a *mandamus* to the collector requiring him to perform the ministerial duty of transmitting papers to the board of appraisers, and to order the board to appraise the goods. The law does not vest the board with authority to make any such order.

The protest recites:

We hereby protest against the liquidation and *assessment of duty* as made by you. * * *.

We claim that the entered value is correct and that the liquidation of the entry was illegal and contrary to law, as we were deprived of our rights to a reappraisal as provided for in subsection 13 of section 28 of the tariff act of August 5, 1909.

With the entry and invoice having duly noted thereupon the appraisal and liquidated rate and amount of duties before him, there can be no question that this protest with mathematical certainty made known to the collector that protestant objected to his decision in assessing duties upon a greater value than the entered value, to wit, the appraised value, exact figures of which were before him, and that the precise ground of that objection was that his decision so determining the amount of duty assessed and assessing a greater amount of duties than that entered was void in that he had prematurely rendered the same while an appeal to reappraisal was pending.

Aside from the fact that this particular protest did precisely "raise the question as to the amount of duties chargeable upon the imported merchandise," we think that the challenge of the Government made, *supra*, to the jurisdiction of the board as to this protest overlooks the real nature of the jurisdiction vested in the board by the statute. The statute in this particular reads:

SEC. 12. * * * All notices in writing to collectors of dissatisfaction of any decision thereof, as to the rate or amount of duties chargeable upon imported merchandise, including all dutiable costs and charges, and as to all fees and exactions of whatever character (except duties on tonnage), with the invoice and all papers and exhibits, shall be forwarded to the board of nine general appraisers of merchandise at New York, to be by rule thereof assigned for hearing or determination, or both. * * *

SEC. 14. That the decision of the collector as to the rate and amount of duties chargeable upon imported merchandise, including all dutiable costs and charges, and as to all fees and exactions of whatever character (except duties on tonnage), shall be final and conclusive against all persons interested therein, unless the owner, importer, consignee, or agent of such merchandise, or the person paying such fees, charges, and exactions other than duties, shall, * * * if dissatisfied with such decision, give notice in writing to the collector, setting forth therein distinctly and specifically * * *.

The statutory expression "as to the rate and amount of duties" is not prescribed as an essential ground of protest, as the Government statement implies. The statute does not enumerate or even attempt to limit the grounds or reasons of protest. It simply requires that they be set forth "distinctly and specifically." The words "as to the rate and amount of duties" are introduced to identify and specify one of the *classes of decisions* against which such protests may be made, heard, and determined by the board. It effects that *every* decision of a collector which fixes a rate or an *amount* of duty is by due protest the subject of review by the board. It is not required by the statute that the rate or the amount of duty determined be *per se* erroneous, but if it is one of that class of decisions that determine either a rate or an amount of duty it is by this statutory phrase one of the enumerated classes of decisions the subject of review by the board, albeit the ground of protest is that the collector rendered it prematurely or otherwise without jurisdiction regardless of the rate or calculated amount of duty. For example, it may have been that there was no appraisalment, or that the collector was not a duly qualified officer, or for other cause affecting the validity of a decision as to the rate and amount of duty upon imported merchandise, though the protest might not assail the accuracy of either the rate or the calculated amount of duty assessed. The words are used by Congress to *define a class of decisions* against which protest will lie for any cause "distinctly and specifically" stated and are not introduced into the statute as a limitation of the grounds upon which a decision of a collector can be assailed. And, in this respect, they are not an exclusive definition of appealable decisions of collectors, which fact

alone demonstrates that they are not a statement of the sole grounds of protest against a decision of a collector of customs. Other classes of decisions of collectors are enumerated by the statute from which appeal by protest lies to the Board of General Appraisers. The Supreme Court has stated these in *In re Fassett* (142 U. S., 479-487), as follows:

The decisions of the collector from which appeals are provided for by section 14 are only decisions as to "the rate and amount" of duties charged upon imported merchandise, and decisions as to dutiable costs and charges, and decisions as to fees and exactions of whatever character. Nor can the court of review pass upon any question which the collector had not original authority to determine.

And, we may add, this very obvious view is supported by the fact that there are other classes of decisions of collectors from which no appeal is allowed to the board not only by reason of not being of those thus enumerated, but by reason of being expressly excepted by this very statute, to wit, decisions of collectors as to "duties on tonnage." So it follows that this being a decision of a collector of customs assessing a rate and an amount of duty, even though neither the accuracy of the rate nor amount of duties *per se* were challenged, that decision being one of that statutory class, is the subject of protest and consideration by the board for any cause distinctly and specifically stated.

Jurisdiction in the board of this class of protests is supported in principle by that class of well-settled and long-established decisions by the Supreme Court declaring jurisdiction in the board to hear and determine protests against a decision of the collector assessing a rate and amount of duty upon imported merchandise upon the ground of an irregular or invalid appraisement. *Oberteuffer v. Robertson* (116 U. S., 499); *Robertson v. Frank* (132 U. S., 17); *Tilge v. United States* (2 Ct. Cust. Appls., 149; T. D. 31676); *Stein v. United States* (1 Ct. Cust. Appls., 36; T. D. 31007); *Stein v. United States* (1 Ct. Cust. Appls., 478; T. D. 31525).

Moreover, this protest not only challenges the increment of duty measured by the liquidated over the entered amount, but alleges the decision of the collector illegal as to the whole reappraisement while appeal thereto was pending. While this exact point seems not to have been heretofore decided by the courts, we think, as was well stated by Judge Somerville in *G. A. 5058* (T. D. 23453), speaking for the board on the precise point, that—

The conclusion is irresistible that the evident intention of Congress was that the various demands for reappraisement, expressly allowed by that statute, were intended to operate after the manner of supersedeas or stay of proceedings.

Indeed equally to the point, may it be said, is the fundamental rule of such statutory proceedings that the mode is the measure of the power and that without compliance, or where permissible due

waiver having been had, with the antecedent requirements the decision of the collector is at least illegal if not void. (See *Tilge v. United States*, *supra*.)

Indeed, article 1068 of the Customs Regulations of 1908 seems to express this legal status exactly.

ART. 1068. *Liquidation pending reappraisement—Additional duty.*—Liquidations are void when made pending an appeal to reappraisement. In such cases liquidation should be suspended until the conclusion of reappraisement proceedings, when the liquidation should accord with the value returned by the general appraisers.

The protest, therefore, went to the point also that this decision of the collector assessing this amount of duty was illegal, were that requirement necessary.

This brings us to the second assignment of error. It is urged by the Government that it was not competent that proof be made of the filing of a reappraisement by parol. The contention is further claimed to be supported by the general principle that a public record can not be varied by parol testimony.

Preliminarily it may be well to define the exact status of these so-called records of protest or appeal clerks of collectors of customs. The statute nowhere requires such. The regulations, however, made under the general law (section 252 of the Revised Statutes), authorizes that "the Secretary of the Treasury * * * shall from time to time establish such regulations * * * to secure a just, faithful, and impartial appraisal of all goods, wares, and merchandise imported into the United States * * *." Pertinent to these considerations the Secretary of the Treasury, acting under this general power, duly promulgated article 1075 of the Customs Regulations of 1908, in force at the time of this importation, providing:

ART. 1075. *Receptacles for protests—Records.*—A receptacle shall be provided at every customhouse for notices of protest, and the date of its reception must be stamped or written upon each; also the date of entry of the merchandise, and of the liquidation, the name of the importing vessel, and serial number of the protest indorsed thereon. A permanent record shall be kept by collectors of customs, or officers acting as such, and by naval officers of all protests at their respective ports, with particulars of the successive steps taken in each case.

This article, however, was related solely to protests filed in classification cases under section 14 of the customs administrative act of 1890 and its succeeding paragraphs. Reappraisement protests, less formal matters, were provided for in article 896 of the same regulations.

ART. 896. * * * Collectors shall hereafter, for better reference, give to each appeal a serial number, in like manner as in protests, treating appeals for reappraisement by a single general appraiser and subsequent appeals for board reappraisement as one appeal under the same serial number, and shall insert such record serial number in the letter transmitting the appeal to and for the use of the board. These serial numbers shall begin upon the receipt of these regulations. * * *

The different requirements may well be contrasted. There is no record requirement of reappraisement protests to be retained by the collector. The sole requirement is to give each a serial number and "insert such record serial number in the letter transmitting the appeal to and for the use of the board." The only record requirement of such appeals seems to be, if of anything, that of serial numbers kept, not with the protest clerk, but, so far as inference shows, with the collector's correspondence. We speak now of course only of what the law and regulations *require*. Any further solemnity of proceedings in these particulars is not *legally required* records.

We are to bear in mind here that first there is no statute or regulation directing the protest clerk to keep record of reappraisement protests, and that the testimony offered did not go to the point of contradicting either a public or gratuitous record, but of supplementing entries or supplying omissions in a nonstatutory record. The rule as to supplying omissions seems in this particular to be well stated and amply fortified by decisions in 17 *Cyclopedia of Law and Procedure* (pp. 587-588) as follows:

(VI) *Supplying omissions*.—Where certain matters are by law required to be made to appear of record or in an official document, an omission as to such matters can not be supplied by parol or extrinsic evidence; nor can the records of official proceedings be supplemented by parol so as to show a compliance with statutory requirements; nor can public officers put into their report by parol evidence matters as to which they were not authorized by law to act; and in no case can an omission which renders the record or document null and void be supplied by parol. But an omission may be explained by parol; and parol evidence may be admissible to show matters which, while they might properly appear on the record or document, are not required to be therein set forth; or matters as to which a record is usually kept, although not required by statute. It has also been asserted that, in the absence of any statute making the record of a public officer or board the sole evidence of his or their proceedings, parol evidence is admissible to show that certain acts were done or proceedings had, although as to them the record is silent, where the rights of innocent persons might otherwise be prejudiced.

c. *Quasi-public records*.—Parol evidence is admissible to explain or contradict records which, while kept pursuant to a public duty or even required by statute, have not the dignity which pertains to the more solemn official records, such as a ship's log book, entries made by physicians in the ward books of an asylum, or the records of a religious society.

It would seem that as the strict rule against such parol testimony will not be enforced where the rights of third parties will be injured we should not, in accordance with the above principles, apply it here in the absence of any statutory or regulative requirement of a record, and where the testimony does not contradict but merely supplies an omission to such a record. That such has been permitted in tax proceedings such as are these, see *Taymouth v. Koehler* (35 Mich., 21).

The last point urged by the Government is against that part of the decision of the board in the nature of a mandate to the col-

lector to send up to the board the reappraisement record for the purpose of reappraisement.

We regard, however, this language of the board a mere definition of the duties of the collector, as viewed by the board, rather than a mandatory direction addressed the collector.

Affirmed.

ULMANN & Co. v. UNITED STATES (No. 1342).¹

CORDS IN PARAGRAPH 349, TARIFF ACT OF 1909.

In view of former decisions, taken together with subsequent practice and legislation as well, it will be assumed the Congress used the word "cord" in paragraph 349, tariff act of 1909, with the same meaning that had been attached to it by cited adjudications and the executive practice conforming thereto.

United States Court of Customs Appeals, June 1, 1914.

APPEAL from Board of United States General Appraisers, G. A. 7527 (T. D. 34089).

[Affirmed.]

Walter Evans Hampton for appellants.

William L. Wemple, Assistant Attorney General (*Thomas J. Doherty*, special attorney, of counsel; *Martin T. Baldwin*, special attorney, on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MARTIN, Judge, delivered the opinion of the court:

The merchandise involved in this case is identical in character with that which was before the court in the case of *Ulmann & Co. v. United States* (4 Ct. Cust. Appls., 77; T. D. 33363), and the testimony taken in that case is incorporated in the present record.

The article comes in running lengths, having a lineal core or center composed of cotton threads around which mercerized cotton threads are spun in such a manner as to form at regular intervals small oval lumps about one-half inch in length.

The importations in question were invoiced as "coronation" and were entered under that name by the importers.

The appraiser reported that the merchandise was "coronation cord composed of cotton," and return for duty was made as cotton cord at the rate of 60 per cent ad valorem under the *eo nomine* provision for cord composed of cotton appearing in paragraph 349 of the act of 1909. Duty was assessed accordingly.

The importers filed their protest against the assessment, claiming duty upon the merchandise at 45 per cent ad valorem as manufactures of cotton not specially provided for under paragraph 332 of the same act.

The protest was submitted upon testimony to the Board of General Appraisers and the same was overruled. The importers now appear from that decision.

¹ Reported in T. D. 34551 (28 Treas. Dec., 1001).

The following is a copy of the relevant part of paragraph 349 of the act of 1909:

349. * * * Nets, nettings, veils, veilings, neck ruffings, ruchings, tuckings, flutings, quillings, embroideries, trimmings, braids, featherstitch braids, edgings, insertings, flouncings, galloons, gorings, bands, bandings, belts, beltings, bindings, cords, ornaments, ribbons, tapes, webs, and webbings; * * * all of the foregoing, composed wholly or in chief value of cotton, * * * sixty per centum ad valorem; * * *

As appears from the foregoing recital the controlling question in the case is whether the importations in question are dutiable as cotton cords, for if they are not dutiable as cords they would be dutiable as manufactures of cotton not specially provided for.

In the former *Ulmann* case, *supra*, the Government contended that the articles in question were cords within the common meaning of that term, no claim of commercial designation being then presented to the court. It was furthermore claimed by the Government in that case that the status of the article in question had been settled to this effect by two decisions of the Board of General Appraisers under the tariff acts of 1894 and 1897, respectively, together with the administrative practice founded thereon, and the implied adoption thereof by Congress by the use of the same word, "cords," in the same manner at the revision of 1909.

In the decision of the case, however, the court held that the article in question, because of its peculiar construction, was not cord within the common application of that term; and as to the Government's claim concerning the two earlier board decisions the court held that there was no proof in the record to establish the identity of the present merchandise with the goods passed upon by the board in those cases, and consequently that those decisions could have no weight in the case.

Upon that record, therefore, the court held against the assessment of the merchandise as cords under paragraph 349. In the course of the decision Judge Barber, speaking for the court, said:

At the hearing before the board the Government introduced some evidence which might have been understood as tending to prove that this "coronation cord" was within the commercial understanding of the term "cords" as used in paragraph 349, but in his brief and argument here the Assistant Attorney General states that this evidence was not introduced for that purpose and is not now claimed to have that effect. The board does not base its conclusion upon any consideration of commercial designation, and we therefore assume that issue is not in this case.

* * * * *

There is no proof in the case at bar as to the administrative practice in the assessment of duty upon merchandise like that here, nor does it satisfactorily appear that the articles before this court are identical with the merchandise which was before the court in each of the two cases referred to. The board in the case at bar does not state that the coronation cord is like that involved in the other two cases, nor does it cite the same as authorities for its decision here. Its judgment went against the importer upon the ground that he had failed to show that the merchandise was not a cord.

The common meaning of the word "cord" being found as above indicated, we think the importer has shown that the articles here are not cords within such meaning.

To sustain the judgment below the Government relies upon the proposition that, as coronation cords were by the cited decisions held to be cotton cords under paragraphs therein invoked, it must be presumed, because Congress thereafter employed the word "cords" without any change of phraseology relating thereto in the acts of 1897 and 1909, that it adopted the construction put by the board upon that word in the respective paragraphs referred to in the acts of 1894 and 1897, and therefore that it describes the merchandise here.

There would be force in this contention if it affirmatively appeared here that the coronation cords under consideration in those two decisions were substantially identical with these before us, and this claim would be reinforced if it were shown that the uniform administrative practice had been since those two board decisions to assess as cords articles that in form, size, and construction were like those involved in this case. Neither of these conditions is, however, shown to exist.

For aught we know the coronation cords involved in those two board decisions may have been in their external physical appearances unlike these before us or may have been of different construction.

In the present case the Government presents three contentions to the court. First, it urges the court to reconsider its former ruling that the article in question is not cord within the common meaning of that term; second, it establishes by sufficient proofs that the merchandise which was before the board in the two cases above referred to was identical in character with that now at bar, and that those decisions were followed in practice by the executive department from about the year 1898 up to the enactment of the act of 1909 and since; and, third, it submits testimony tending to establish a commercial designation of the article as cord (the importers submitting opposing testimony upon this subject).

In answer to the Government's application for a reconsideration of the court's decision concerning the common or ordinary meaning of the word "cord" it may be said that upon such a reconsideration the court is content with its former decision. In that decision the reasons for the conclusion reached are fully set out and need not now be repeated.

The two other branches of the Government's present case, however, namely, the effect of the former decisions taken together with subsequent practice and legislation and the claim of commercial designation, are now for the first time brought before the court. In the present case the board has approved the claim of the Government relating to the force and effect of the former decisions, together with the subsequent administrative procedure and the implied legislative approval thereof, and has also found upon the testimony in favor of the claim of commercial designation.

In respect to the first claim of the Government it may be said that goods identical in character with those at bar were before the Board of General Appraisers in the case of *T. Buettner & Co.*, reported on December 22, 1896, as T. D. 17750. The case arose under the tariff

act of 1894, and the issue was precisely the same as that now before the court, namely, whether this identical article was dutiable at 45 per cent ad valorem under the *eo nomine* classification of cotton "cord" or at 35 per cent ad valorem as "manufactures of cotton not specially provided for." The following is the decision copied in full:

Opinion by HAM, General Appraiser:

The merchandise in this case consists of coronation cords made of cotton, assessed for duty at 45 per cent ad valorem under paragraph 263, act of August 28, 1894, but claimed to be entitled to entry at 35 per cent ad valorem under paragraph 264 of said act. The case was heard at Chicago December 1, 1896, where the appellant appeared and testified in his own behalf.

The evidence, which includes a verified sample of the merchandise, shows that the article in controversy is a cotton cord used in appliqué work, and that it is known commercially as coronation braid or cord. The label found in the record has printed upon it the words "coronation braid" and the article is invoiced as "coronation cord."

The protest seems to have no merit, and is, therefore, overruled, and the collector's decision is affirmed.

Afterwards in the case of Chas. D. Stone & Co., reported on March 25, 1898, as T. D. 19156, another issue came before the board under the tariff act of 1897 concerning goods of identical character. The question raised in the case was whether the goods were dutiable under that act at 60 per cent ad valorem as cotton braids or as 45 per cent ad valorem as cotton cord. The board again held the articles to be dutiable as cotton cord. The following is a copy of the decision:

Opinion by HAM, General Appraiser: The merchandise in this case consists of cotton coronation cords, assessed for duty at 60 per cent ad valorem under paragraph 339, tariff act of July 24, 1897, as cotton braids, but claimed to be entitled to entry at 45 per cent ad valorem under paragraph 330 of said act.

The case presented here is similar to that covered by board decision in *re* Buettner, G. A. 3736, rendered December 22, 1896, under the tariff act of 1894. In his special report the appraiser states that the merchandise in question is cotton coronation cords (or braids) "similar in all respects to the merchandise subject of G. A. 3736;" but an examination of the sample shows that the article is a cord and not a braid. It therefore falls directly within the claim of the protest, namely, under paragraph 320, which provides for "cords, * * * made of cotton or other vegetable fiber, whether composed in part of india rubber or otherwise, and not embroidered by hand or machinery."

The protest is sustained, and the decision of the collector reversed, with an appropriate order of reliquidation.

It will be observed that the first of the foregoing decisions was favorable to the Government, whereas the second was favorable to the importers. The appellants contend that the latter case is entitled to little weight as an authority in favor of the cord classification because of the fact that under the tariff act of 1897 "cotton cords" and "manufactures of cotton, not specially provided for" were dutiable at the same rate, to wit, 45 per cent ad valorem, and conse-

quently the importers could have no motive in distinguishing between these two classifications. This argument, however, is not applicable to the circumstances of the case. For in that case the merchandise had been assessed at 60 per cent ad valorem as cotton braids, and the importers were objecting to the assessment. It was open to the importers to base their protest upon the claim that the goods were "cotton cords," or upon the claim that they were "manufactures of cotton, not specially provided for," both of which were dutiable at 45 per cent ad valorem. As between these two classifications bearing equal duty the importers based their protest upon the claim that the article in question was cotton cord. In this instance the importers could have had no motive except to select the stronger of the two claims; therefore their adoption of the claim that the article was cotton cord was all the more significant. The board sustained this claim, for had not the board found the article to be cotton cord the protest would have been overruled.

It seems that the Government afterwards made up another case for the trial of the same issue under the tariff act of 1897, which met with the same decision at the hands of the board, upon the authority of the case last above cited. Abstract 3554 (T. D. 25735). It appears however, that even before the board's decision in the last case the administrative department had informally acquiesced in the former decision, and from that time on regularly assessed the article in question as cord. The proof of this fact appears in the testimony of the witnesses Wallace, Hadley, Flateau, Appleyard, and Beller, and indeed does not seem to be denied by the appellants. The publication of these decisions and the executive practice founded thereon possess an importance which is independent of any question concerning the correctness of the decisions upon the records then presented to the board or the completeness of the respective records upon the question involved.

Upon these facts it should be assumed that Congress used the word "cord" in the tariff revision of 1909 with the same meaning as that given it by the adjudications above cited and the executive practice had in conformity therewith. *United States v. Baruch* (223 U. S., 191).

In accordance with the foregoing conclusion the court is convinced that the decision of the board should be affirmed. This conclusion makes it unnecessary to enter upon a discussion of the subject of commercial designation, since in any view of that subject the decision must be the same.

Affirmed.

LANG et al. v. UNITED STATES (No. 1348).¹

CASTINGS UNDER PARAGRAPH 147, TARIFF ACT OF 1909.

These are finished castings, molded, drilled, and machined; but to make the machine complete rubber gaskets, filter cloths, bronze fittings, cocks, etc., are required. They are not adapted to the final use for which they were made; they are not "made up into articles."

United States Court of Customs Appeals, June 1, 1914.

APPEAL from Board of United States General Appraisers, Abstract 34937 (T. D. 34219).

[Reversed.]

Hatch & Clute (Walter F. Welch of counsel) for appellants.

William L. Wemple, Assistant Attorney General (Charles E. McNabb, assistant attorney, of counsel; Thomas J. Doherty, special attorney, on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

This case involves castings which were assessed for duty under paragraph 199 of the tariff act of 1909 as "articles or wares not specially provided for * * * composed wholly or in part of iron." They are claimed by the importer to be classifiable under paragraph 147 of the same act as "castings of iron or cast-iron plates which have been chiseled, drilled, machined, or otherwise advanced in condition, * * * but not made up into articles."

The appraiser reported the merchandise to consist of brewing machines, and as they were not specially provided for they were returned for duty as manufactures of metal under paragraph 199.

The testimony adduced on the part of the importer, which is uncontradicted, shows that the castings were designed for use for mash filters. They are the finished castings, molded, drilled, and machined. But in order to make the machine complete, they require rubber gaskets, which are imported separately from Munich. They also require filter cloths, which are imported from Castile. They also require a considerable amount of copper work, which is made in this country, and also bronze fittings, cocks, etc., made in this country.

The evidence further shows that they are not adapted to the use for which they are ultimately intended in the absence of all these various parts. The board so found. In the opinion it is stated:

The articles are invoiced as mash filters in iron without brass and rubber fittings and without filtering cloths. The evidence, however, establishes that, while certain missing bronze, brass, and rubber fittings are essential to perfect and complete the ma-

¹ Reported in T. D. 34552 (26 Treas. Dec., 1906).

chines, the invoiced parts are in their imported condition capable of being bolted and fitted in such manner as to cause them to lose their identity as advanced castings and to bring them within the category of manufactured articles of metal.

The assessment was therefore affirmed. The importer appeals.

Paragraph 147 has had consideration by this court in two cases. In *Jackson v. United States* (2 Ct. Cust. Appls., 475; T. D. 32227) we considered an article admittedly complete in itself except that it was imported in the knockdown. Such an importation, consisting wholly of castings, was held to fall within the term "made up into articles," as all that remained to be done was to assemble it to make it complete.

In *United States v. Leigh & Butler* (4 Ct. Cust. Appls., 304; T. D. 33517), on the other hand, we held that castings for use in machines, imported to be sold separately, were dutiable as castings, although as castings they were complete in themselves and might in one sense be termed "articles." This was held upon the ground that the wording of paragraph 147 required such a construction in order to give any force or effect to the clause "made up into articles." Castings as described in the paragraph clearly contemplated the advance of rough castings to a state which would dedicate them to use in connection with other castings for some practical end. Therefore it would seem that when the limitation was made to castings not made up into articles, such limitation imported that the castings must not only be adapted for use in an article such as a machine, but that its parts when assembled would constitute an article or machine. Is the present importation such a complete article? We think not. It is not yet adapted to its final use, lacking as it does substantial parts, without which it can not be devoted to the ultimate contemplated use. We are not dealing with a case in which the missing parts are inconsequential or insignificant, such, for instance, as screws used in assembling chairs imported in the knockdown, but the case presented is one in which various very substantial parts yet to be imported or manufactured in this country are to be supplied before the casting can be made up into an article adapted to use. To meet the requirement of the statute it must at least constitute substantially the article which is to be finally fitted for use.

While the case is a border-line case, we think that the better view is that above expressed, and giving the importer the benefit of the doubt in construing the statute, the result above indicated is the correct one. The decision of the board will be *reversed*.

DENIKE v. UNITED STATES (No. 1356).¹

MERCHANDISE MADE OF DUTIABLE AND NONDUTIABLE ARTICLES.

These wheels and axles of American manufacture, with tires made in Germany, were shipped into Mexico to have certain alterations made there and were then returned to the United States. The goods were not dutiable as entireties. The wheels and axles should have been admitted free under paragraph 500, tariff act of 1909, as articles the growth, produce, or manufacture of the United States. The tires, made in Germany, were dutiable at 1½ cents per pound.

United States Court of Customs Appeals, June 1, 1914.

APPEAL from Board of United States General Appraisers, Abstract 34555 (T. D. 34090).

[Reversed.]

C. W. Wickersham (*Charles E. Hughes, jr.*, of counsel) for appellant.

William L. Wemple, Assistant Attorney General (*William A. Robertson*, special attorney, of counsel; *Frank L. Lawrence*, special attorney, on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

SMITH, Judge, delivered the opinion of the court:

Three sets of engine wheels, carrying their tires and mounted on axles, were sent by the Texas-Mexican Railway for repairs to the shops of the National Railways of Mexico, at Nuevo Laredo, Mexico. The wheels and axles were of American manufacture, but the tires were made in Germany, and after importation into this country were fitted to the American wheels. At Nuevo Laredo, Mexico, the tires while still on the wheels, were turned, and as a result of the turning the sharpness of the flange and certain flat spots on the tread were removed. No work was done on the wheels or axles. The cost of turning the tires was \$15, and was charged by the Texas-Mexican Railway Co. to engine account. Whether the \$15 charged was Mexican or American money does not appear from the record, but we assume it was Mexican money, inasmuch as the work was done in Mexico at the shops of the National Railways of Mexico. After the repairs were made, the wheels, tires, and axles, fitted together, were returned to Laredo, Tex., where they were entered as "3 pairs driving wheels on axles, value \$132, free, repairs in Nuevo Laredo shops, value \$9; rate of duty 45 per cent," presumably the rate imposed on articles of metal by paragraph 199 of the tariff act of 1909. The duty assessed on the importation by the collector of customs at Laredo was \$4.05, which amount was paid by the importer on January 4, 1913. Seven days later the collector of customs reliquidated the entry and exacted a duty of \$258.58 on the wheels, tires, and axles as entireties under the provisions of paragraph 171 of the tariff act of 1909, which, in so far as pertinent, reads as follows:

171. Wheels for railway purposes, or parts thereof, made of iron or steel, and steel-tired wheels for railway purposes, whether wholly or partly finished, and iron or steel

¹ Reported in T. D. 34553 (26 Treas. Dec., 1008).

locomotive, car, or other railway tires or parts thereof, wholly or partly manufactured, one and one-fourth cents per pound; * * * : *Provided*, That when wheels for railway purposes, or parts thereof, of iron or steel, are imported with iron or steel axles fitted in them, the wheels and axles together shall be dutiable at the same rate as is provided for the wheels when imported separately.

The importer protested that the importation was entitled to entry free of duties "other than the charges of labor for turning." The Board of General Appraisers overruled the protest and the importer appealed.

By paragraph 500 of the tariff act of 1909 Congress clearly indicated its intention that articles the growth, produce, or manufacture of the United States should be entitled to free entry when returned after having been exported without having been advanced in value or improved in condition by any process of manufacture or other means. This intention was given additional emphasis in the proviso to the paragraph, under which it would seem that exported goods manufactured in the United States of imported materials and materials of American origin may be reimported upon payment of duties equal to the drawbacks allowed at the time of exportation on the imported materials used in the original manufacture.

Having in mind the purpose of Congress to favor goods the growth, produce, or manufacture of the United States, we think that merchandise imported into the country made up in part of American goods entitled to free entry and in part of goods not entitled to free entry should not be assessed for duty as *entireties* if the components of the importation are in fact distinct articles and so distinguished one from the other that their several dutiable quantities, weights, measures, or values may be correctly ascertained. From the evidence in the case, which is undisputed, it appears that axles, wheels, and tires are made by different factories and are not only readily separable one from the other, but are as a matter of fact frequently separated either to make repairs or to substitute a new axle, wheel, or tire. As the weight of the German tire might have been readily ascertained and the American wheel and axle had not been at all advanced in value or improved in condition, duty should have been assessed on the weight of the tire and not the weight of the wheel and axle. This conclusion is supported by the principle laid down in the case of *Hillhouse v. United States* (152 Fed., 163), in which it was held that an automobile entitled to free entry when exported from the United States was not dutiable as an *entirety* on reentry by reason of new parts added while abroad and that the additions only were subject to duty. The Government contends that *Hillhouse v. United States* was distinguished in *United States v. Auto Import Co.* (168 Fed., 242), by Judge Lacombe, who announced the opinion of the court in both cases. Judge Lacombe did distinguish the two cases and did say in the *Auto Import Co.* case that it would be an unreasonable extension of the proposition

in the Hillhouse case "to hold that importations dutiable at some particular rate as completed articles may be constructively separated for duty purposes into parts subject to different classifications." Judge Lacombe did not say, however, that an importation made up in part of dutiable articles of foreign origin and in part of nondutiable articles of American origin was dutiable as an entirety, and the language used by him went no farther, in our opinion, than to indicate that the doctrine of Hillhouse v. United States could not in any event be extended to completed articles, all the constituents of which were dutiable.

The protest in this case was very inartificially drawn and failed to state that the turning was done on the tire. The protest, however, was directed to the turning, and from the importation itself it was evident to the collector that the work was done on the tire. The entry of the importer claimed free entry for three pairs of driving wheels on axles. The statement in the protest that duties should only have been assessed on the value of the labor was too broad a claim of exemption. Nevertheless, it sufficiently challenged the attention of the collector to the claim of exemption, as appears from his return, in which he states:

These were foreign tires and from examination I feel sure that they are new Krupp tires, although the other parts of the wheels and axles are American manufacture.

From this it seems apparent that the collector recognized that the issue between himself and the importer was whether the wheels, axle, and tires should be assessed as an entirety or classified separately and assessed accordingly. In our opinion, the wheels and axles should have been admitted free and duty assessed on the tires at the rate of 1½ cents per pound.

The decision of the Board of General Appraisers is *reversed*.

UNITED STATES v. CASTLE, GOTTHEIL & OVERTON (No. 1371).¹

GERMAN WOOD PULP MANUFACTURED FROM WOOD CUT IN RUSSIA.

The expression in section 2, act of July 26, 1911, "being the products of Canada," describes and refers to wood pulp manufactured in Canada from pulp wood, without regard to the place or country where the wood grew or was cut. Balfour v. Sullivan (19 Fed., 578). The condition of free entry here was that the wood from which it was made must be entitled to free and unrestricted export and there was no intention to declare that the country of manufacture must also be the country of origin of the raw material. Under the favored-nation clause this German wood pulp made of wood cut in Russia was entitled to free entry.

United States Court of Customs Appeals, June 1, 1914.

APPEAL from Board of United States General Appraisers, G. A. 7532 (T. D. 34185).
[Affirmed.]

William L. Wemple, Assistant Attorney General (William A. Robertson, special attorney, on the brief), for the United States.

Comstock & Washburn for appellees.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

¹ Reported in T. D. 34554 (26 Treas. Dec., 1011).

BARBER, Judge, delivered the opinion of the court:

The merchandise, the dutiability of which is the question in this case, is 125 bales of bleached chemical wood pulp.

The collector at the port of New York assessed duty upon this pulp presumably under the provisions of paragraph 406 of the tariff act of 1909. The importers protested, claiming free entry under the provisions of section 2 of the act of July 26, 1911, entitled "An act to promote reciprocal trade relations with the Dominion of Canada, and for other purposes," and the provisions of what are commonly called "the most favored nation clause" in treaties subsisting between Prussia and other German States now composing the German Empire. The Board of General Appraisers sustained the protest.

No witnesses testified before the board, but the case was heard upon the papers and the following stipulation:

It is hereby stipulated and agreed by and between the parties hereto that the wood pulp, the subject of the protest above named, was manufactured in Germany from pulp wood grown and cut in Germany and Russia, but not in Finland, and exported directly to the United States from Germany, and that neither the wood pulp nor pulp wood were subject to any export duty, export license fee, or other export charge of any kind whatsoever (whether in the form of additional charge or license fee or otherwise), or any prohibition or restriction in any way of the exportation (whether by law, order, regulation, contractual relation, or otherwise) directly or indirectly.

It is unnecessary to consider or construe any treaty invoked by the importers, because it is agreed by counsel upon both sides, in view of the holding of this court in *American Express Co. v. United States* (4 Ct. Cust. Appls., 146; T. D. 33434) and in *Cliff Paper Co. v. United States* (4 Ct. Cust. Appls., 186; T. D. 33435) that the construction and effect to be given these treaties and said section 2 of the act of July, 1911, is such that if the wood pulp in this case had been manufactured from pulp wood cut in Germany the importation here would be entitled to free entry.

We proceed, therefore, to consider the sole remaining question, which is, Should duty be assessed on wood pulp manufactured in Germany from pulp wood cut in Russia, it appearing that neither the wood pulp nor the pulp wood were subject to any export duty, fee, or charge of any kind, or to any prohibition or restriction of export whatsoever?

This involves a consideration of said section 2 of the act of July 26, 1911, which we quote:

SEC. 2. Pulp of wood mechanically ground; pulp of wood, chemical, bleached, or unbleached; news print paper, and other paper, and paper board, manufactured from mechanical wood pulp or from chemical wood pulp, or of which such pulp is the component material of chief value, colored in the pulp, or not colored, and valued at not more than four cents per pound, not including printed or decorated wall paper, being the products of Canada, when imported therefrom directly into the United States, shall be admitted free of duty, on the condition precedent that no export duty, export license fee, or other export charge of any kind whatsoever (whether in the form of

additional charge or license fee or otherwise), or any prohibition or restriction in any way of the exportation (whether by law, order, regulation, contractual relation, or otherwise, directly or indirectly), shall have been imposed upon such paper, board, or wood pulp, or the wood used in the manufacture of such paper, board, or wood pulp, or the wood pulp used in the manufacture of such paper or board.

It is agreed that, if under this section wood pulp manufactured in Canada from pulp wood cut elsewhere would be entitled to free entry, assuming the condition and tariff status of said wood pulp and wood to be correspondingly identical with the status and condition of the wood pulp and wood in this case, it follows that the wood pulp here is entitled to free entry; otherwise it is not.

An examination of section 2 results in a further reduction of the issue to this single question, Does the term "being the products of Canada" employed therein require that the pulp wood from which the wood pulp is manufactured must be cut in Canada, must be the growth of its soil?

The Government strenuously contends for an affirmative and the importers with equal vigor for a negative answer to this question.

We have no doubt that the word "product" or "products" is often used to designate manufactured articles as well as those which are the produce of the soil. All lexicographers seem to recognize this fact.

As somewhat typical of the meaning given to the word "product" in the dictionaries, we quote from Webster's New International:

1. Anything produced, as by generation, growth, labor, or thought, or by the operation of involuntary causes; as the *products* of the season, or of the farm; the *products* of manufactures; the *products* of the brain.

* * * * *

Syn. Product. Production. Produce.

Product is the general word for that which is produced in any fashion.

The word "manufactures" is undoubtedly quite as appropriate a word to apply to articles which have been manufactured, and the expression "manufactured products" would be equally or more explicit, depending upon the precise meaning desired to be conveyed; but we think the word "products" undoubtedly may properly be applied to and include manufactured articles, and, unless the contrary in some manner appears, that the expression in section 2 "being the products of Canada" describes and refers to wood pulp manufactured in Canada from pulp wood, without regard to the place or country where the wood grew and was cut.

As in principle supporting this view we refer to the case of *United States v. Downing* (146 Fed., 56). There the Circuit Court of Appeals, under a statute providing that—

If there be imported into the United States crude petroleum, or the products of crude petroleum produced in any country which imposes a duty on petroleum or its products exported from the United States, there shall in such cases be levied, paid, and collected a duty upon said crude petroleum or its products so imported equal to the duty imposed by such country.

held that the country in which the products of the crude petroleum were produced by manufacture was the country of their production without regard to the country in which the crude petroleum was obtained.

Of course, as pointed out by the Government, this decision was to the effect that the given articles made from crude petroleum were, in the sense of the statute, as products of crude petroleum, related to the country in which the crude material had been manufactured into such products. But if they were the products of crude petroleum in the manufacturing country they were also the products of that country, and they were its products although the raw material was not therein produced. See also *United States v. Marsily* (165 Fed., 186).

In *Balfour v. Sullivan* (19 Fed., 578), in Circuit Court, grain bags had been manufactured in this country out of material of foreign production. These bags had been filled with wheat produced in California, shipped to England, the contents removed, and the empty bags returned to California. It was claimed under these circumstances that the bags were not dutiable when so returned to this country. The statute provided that "grain bags the manufacture of the United States" might be returned to this country free of duty. The Government claimed these bags were not entitled to that privilege because they were not the manufacture of the United States, in that their raw material was of foreign production. It was held that these bags were the manufacture of the United States. This holding seems to have been affirmed in the Supreme Court. (See T. D. 8457.)

In G. A. 7172 (T. D. 31314), decided January 16, 1911, the Board of General Appraisers in a carefully considered opinion held—

that where the raw material is produced in one country and the process of manufacture is conducted in another, an article subjected to such manufacture may be considered the product of the latter country.

In 1884 (T. D. 6671), the Department of Justice held that rum made of materials of foreign origin was a manufacture of the United States. This view was adopted by the Treasury Department and instructions issued to the collector of customs to be governed thereby.

We proceed to a more careful consideration of said section 2 to ascertain if possible whether Congress used the expression "being the products of Canada" in a restricted sense as referring to products made from raw material of Canadian growth, as claimed by the Government, for, if so, the wood pulp manufactured from pulp wood cut in Russia is dutiable, and this examination is extended to other sections of the act of which section 2 is a part.

The opening paragraph of section 1 of the act declares that the duties therein mentioned shall be levied and collected upon articles that are the "growth, product, or manufacture" of Canada, and this language is several times repeated in the act.

The word "growth" of course limits the merchandise which it may describe to the product of the soil, and if Congress had intended

that this limitation should attach to the merchandise which was the subject of section 2 it would naturally be expected, in view of its previous care in selecting language to express its will, that Congress would have employed in said section some such term as "being manufactured from wood grown in Canada." No language of that express import, however, is to be found therein. The word used is "products," and these products are in fact manufactured articles. If, as was held in *Balfour v. Sullivan*, *supra*, grain bags made here of foreign material were the manufacture of the United States, clearly wood pulp made in Canada from foreign material must be the manufacture of Canada.

Nor, considered without regard to other portions of the act, do we find in section 2 any satisfactory indication that the merchandise therein given free entry is required to be a product of the soil of Canada. The merchandise itself is certain wood pulp, paper, and paper board. To such thereof as is within the condition precedent in all respects free entry is given.

This condition precedent is attached to *materials* only, and not to their place of origin, and the condition is such that such *materials* shall be possessed of the free unrestricted right of export. Acid is used in the manufacture of chemical wood pulp; sizing enters into the manufacture of paper, and yet it can hardly be supposed that Congress intended that these articles when employed in producing the merchandise named must also be made from raw materials whose origin was Canada. No language of the section expressly declares that the raw material must be of Canadian origin, and unless it be so required, the pulp wood from which the wood pulp in this case was made possesses all the attributes required by the condition precedent.

Neither do we find in the purposes to be accomplished by the section any sufficient indication of an intention to limit the meaning of the word "products," as claimed by the Government. Manifestly one purpose was to promote the free export of pulp wood to this country. It was also desired to encourage and promote the export to this country of the named manufactured products of pulp wood. The consumers of wood pulp, paper, and paper board were equally benefited by its free entry here whether the wood from which it was produced came from Canada or some other country. Congress provided as the declared condition of such free entry that the wood from which it was made must be entitled to free and unrestricted export without declaring that the country of manufacture must also be the country of origin of the raw material, and we see no reason to read into the statute anything beyond what we consider its plain meaning in this regard.

In the argument it is contended by the Government that in the case of *Cliff Paper Co. v. United States*, *supra*, we have impliedly

decided the issue here against the importers' contention. It is sufficient to say that the question here raised was not before us in that case, was not considered, and was not decided.

The judgment of the Board of General Appraisers is *affirmed*.

DISSENTING OPINION.

DE VRIES, Judge: For the reasons set forth in the dissenting opinions in *American Express Co. v. United States* (4 Ct. Cust. Appls., 146; T. D. 33434) and in *Cliff Paper Co. v. United States* (4 Ct. Cust. Appls., 186; T. D. 33435) I dissent.

UNITED STATES *v.* SHELDON & Co. *et al.* (No. 1372).¹

PROOF OF COMMERCIAL DESIGNATION.

The merchandise consists of the pulp and juice of the currant, preserved, presumably, in sirup or molasses. This is not a jelly in fact, and while the board found it to be commercially known as jelly, there was no proof of commercial designation. The collector's assessments, in the absence from the record of evidence to controvert it, must be sustained.—*United States v. Oberle* (1 Ct. Cust. Appls., 527; T. D. 31545).

United States Court of Customs Appeals, June 1, 1914.

APPEAL from Board of United States General Appraisers, Abstract 34779 (T. D. 34186).

[Reversed.]

William L. Wemple, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, of counsel; *Samuel Isenschmid*, special attorney, on the brief), for the United States.

Submitted on record by appellee.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

BARBER, Judge, delivered the opinion of the court:

The merchandise involved in this appeal was invoiced as bar-le-duc red currants and was assessed at 1 cent per pound and 35 per cent ad valorem under paragraph 274 of the tariff act of 1909 as preserved fruit. This assessment was protested by the importers, who described the merchandise in the protests in the same language employed for that purpose in the invoice and claimed that it was dutiable as jellies at 35 per cent ad valorem under the same paragraph.

At the hearing before the board the importers called no witnesses. One, an examiner of merchandise at the port of Chicago, testified on behalf of the Government. On direct examination he said that prior to June, 1908, the merchandise, although not a jelly, was labeled "bar-le-duc jelly" and allowed to be sold that way; that since June, 1908, the United States Department of Agriculture had refused to allow the merchandise to go on the market labeled as a jelly and that since 1908 it had been labeled "bar-le-duc." Upon

¹ Reported in T. D. 34555 (26 Treas. Dec., 1015).

cross-examination he testified that the merchandise was identical in character with that covered by Abstract 31794 (T. D. 33291). Upon this record the Board of General Appraisers sustained the protests.

In its opinion the board states among other things that—

This commodity has been before the board and the courts heretofore, and has been held, by reason of its commercial designation, to be jelly, the fact at the same time being recognized that it is not a true jelly. Citing T. D. 23848 and Abstract 31794 (T. D. 33291).

The board further said:

We think that under the circumstances of this case we are warranted in presuming, it not clearly appearing to the contrary, that commercial designation having been previously shown and acted upon by the courts, it would be presumed to continue. Again citing Abstract 31794 (T. D. 33291).

The Government appeals, and argues the case here upon its brief. The importer submits upon the record.

The importers here were not parties to the cases cited by the board. The testimony we have heretofore mentioned is the substance of all that is relevant in this case.

The merchandise at bar consists, as set forth in the invoice and protests and as shown by the official exhibits, of the pulp and juice of the currant preserved presumably in sirup or molasses.

This is not jelly in fact. *Bogel v. United States* (1 Ct. Cust. Appls., 144; T. D. 21188); *Meyer v. United States* (3 Ct. Cust. Appls., 247; T. D. 32565).

The collector has assessed the merchandise for duty in accordance with its condition in fact and his action is presumed to be correct until otherwise shown.

The board has sustained the protests upon the view that although not jelly in fact the merchandise under consideration was nevertheless commercially known as jelly.

It is well settled that commercial designation must be established by proof and that the burden is upon him who asserts it. It is not a matter of judicial cognizance. *United States v. Goldberg* (3 Ct. Cust. Appls., 282; T. D. 32573) and cases there cited.

We have, therefore, for review a judgment declaring that an article not jelly in fact is nevertheless commercially known as jelly, with no proof of such commercial designation except such as was within the cognizance of the Board of General Appraisers in another case or cases, the record of which is not before us for consideration.

This brings the case within the ruling of *United States v. Oberle* (1 Ct. Cust. Appls., 527; T. D. 31545) in which we held that—

It seems unnecessary to say where a decision is rested upon a record or records in which the crucial point in the issue is one of commercial designation or any other probative fact, and these records are not a part of the record before this court, there is not before the court sufficient testimony to sustain the finding of the board.

The judgment of the Board of General Appraisers is *reversed*.

ATLANTIC TRANSPORT CO. v. UNITED STATES (No. 1337).¹

1. JURISDICTION.

The court may at any stage raise the question of jurisdiction of the subject matter, and the determination of the trial court that it has jurisdiction adds nothing to the force of its judgment.

2. BOARD'S JURISDICTION UNDER SUBSECTION 14 OF SECTION 28, ACT OF 1909.

The appellant was required to pay for the services of inspectors who supervised the loading of a vessel at night and on Sundays and holidays. Subsection 14 of section 28, tariff act of 1909, was not intended to confer jurisdiction upon the board in any cases other than those related to duties or charges on imported goods, and the charges here could not be reviewed.—Czarnecki's case, G. A. 3785 (T. D. 17851).

3. DRAWBACKS AND THE SECRETARY OF THE TREASURY.

The jurisdiction to allow or refuse drawbacks is vested in the Secretary of the Treasury, and it would seem incongruous to vest in another tribunal the decision of questions relating to the charges connected with the exportation of drawback goods, which in effect result in a reduction of the allowance of drawback.

United States Court of Customs Appeals, October 29, 1914.

APPEAL from Board of United States General Appraisers, G. A. 7513 (T. D. 33979) and Abstract 34480 (T. D. 34069).

[Affirmed.]

Comstock & Washburn (J. Stuart Tompkins on the brief) for appellant.

Bert Hanson, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, of counsel; *William A. Robertson*, special attorney, on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

This protest is against the action of the collector in requiring protestants to pay for the services of inspectors while supervising the loading of a vessel at night and on Sundays and holidays. The vessel was being laden with goods upon which a drawback was claimed. The protest was overruled, and the protestants appeal. Before the hearing, counsel for the Government entered a motion to dismiss the proceedings for want of jurisdiction. This motion was overruled, and the case proceeded to final decision as above stated.

In this court Government's counsel reasserts the claim that the board is not given jurisdiction of this class of cases. It is suggested on behalf of the protestants that as there was no appeal from the order overruling the motion to dismiss, the question is now foreclosed. It would seem, however, that the court may at any stage raise the question of jurisdiction of the subject matter, and should do so, and that the determination of the trial court that it has jurisdiction adds nothing to the force of its judgment. See *Brown on Jurisdiction* (second edition, sec. 26, at pp. 131 and 132), where it is said:

If the court lacks jurisdiction over the subject matter of the controversy, all the authorities agree that the judgment is void, however honestly it may believe it is

¹ Reported in T. D. 84872 (27 Treas. Dec., 376).

acting rightfully, whatever may be the recitals of its record, however formal may be its acts, or however judicious its conclusions. If it lacked power to perform the judicial act it undertook, its findings that it had jurisdiction adds nothing to the verity of its pretended judgment. Its power was usurped, and its finding that it possessed the power in no way confers it.

See also *Railroad Co. v. Swan* (111 U. S., 379, at pp. 382 and 383).

Furthermore, the decision of the motion was interlocutory and no appeal could have been taken therefrom. *Brady v. Railroad Co.* (73 Mich., 457).

The question of jurisdiction therefore stands for decision, and the question, stated briefly, is whether subsection 14 of section 28 of the act of 1909, corresponding to section 14 of the customs administrative act of 1890, was intended to confer jurisdiction upon the board in any cases other than those relating to duties or charges on imported goods.

In the decision of this question, consideration should be given to the fact that importation is complete before any action to secure a drawback becomes necessary, and that the jurisdiction to allow or refuse drawbacks is vested in the Secretary of the Treasury; hence there would be a seeming incongruity in vesting in another tribunal the decision of questions relating to the charges connected with the exportation of drawback goods, which in effect result in a reduction of the allowance of drawback. If the statute confers such jurisdiction, the seeming incongruity would not of course be an obstacle to its enforcement, but the circumstance throws a sidelight on the question.

Another significant fact is that the appeals to this court authorized by subsection 29 of section 28 of the act of 1909 were obviously intended to cover the same class of cases as were brought within the jurisdiction of the board by subsection 14. These two subsections should be construed together and are intended to outline the cases in which the judicial action by the board and of this court was authorized. If this be not so—that is, if it be held that it was the intention of Congress to vest the board with jurisdiction in a class of cases not made appealable to this court—this conclusion would be fatal to the appellants in this case for want of jurisdiction of this court to review the board's decision. We think, however, that no purpose on the part of Congress to vest a jurisdiction in the board over cases not reviewable by this court (except in appraisements) can be found if the terms of the act as a whole be considered.

The pertinent provisions are as follows:

SEC. 14. That the decision of the collector as to the rate and amount of duties *chargeable upon imported merchandise*, including all dutiable costs and charges, and as to all fees and exactions of whatever character (except duties on tonnage), shall be final and conclusive against all persons interested therein, unless the owner, importer, consignee, or agent of such merchandise, or the person paying such fees, charges, and exactions other than duties, shall, within fifteen days after but not before

such ascertainment and liquidation of duties, as well in cases of merchandise entered in bond as for consumption, or within fifteen days after the payment of such fees, charges, and exactions, if dissatisfied with such decision, give notice in writing to the collector, setting forth therein distinctly and specifically, and in respect to each entry or payment, the reasons for his objections thereto, *and if the merchandise is entered for consumption shall pay the full amount of the duties and charges ascertained to be due thereon.* Upon such notice and payment the collector shall transmit the invoice and all the papers and exhibits connected therewith to the board of nine general appraisers, for due assignment and determination as hereinbefore provided; such determination shall be final and conclusive upon all persons interested therein, and the record shall be transmitted to the proper collector or person acting as such, who shall liquidate the entry accordingly, except in cases where an application shall be filed in the United States Court of Customs Appeals within the time and in the manner provided for in this Act.

SEC. 29. The Court of Customs Appeals established by this Act shall exercise exclusive appellate jurisdiction to review by appeal, as provided by this Act, final decisions by a board of general appraisers in all cases as to the construction of the law and the facts respecting the classification of merchandise and the rate of duty imposed thereon under such classification, and the fees and charges *connected therewith*, and all appealable questions as to the jurisdiction of said board, and all appealable questions as to the laws and regulations governing the collection of the customs revenues; and the judgment or decrees of said Court of Customs Appeals shall be final in all such cases. * * * Said Court of Customs Appeals shall have power to review any decision or matter within its jurisdiction and may affirm, modify, or reverse the same and remand the case with such orders as may seem to it proper in the premises, which shall be executed accordingly.

It will be noted that the jurisdiction conferred upon this court is to review final decisions by a board in all cases as to construction of the law and facts respecting the classification of merchandise and the rate of duty imposed thereon and the fees and charges *connected therewith*. This would seem to be clear, and it would appear that without extending unwarrantably the terms of the statute conferring jurisdiction the court could not take jurisdiction of a case involving fees and charges in no way connected with the importation of merchandise or the steps taken toward a proper classification. The later provision above quoted in no way enlarges the class of cases in which jurisdiction is given.

Turning to subsection 14, we find that while the intent is not so clearly expressed as in subsection 29, yet the purpose to restrict the jurisdiction as to fees and exactions to such fees and exactions as relate to imported merchandise is fairly to be inferred, if we read the broad language in connection with other provisions of the act. In declaring the class of cases in which the decision of the collector is to be deemed final, it refers to duties chargeable upon imported merchandise, *including* dutiable costs and charges and as to all fees and exactions of whatever character, except duties on tonnage. If this broad language is segregated from its context, it might be broad enough to include all fees and exactions by the collector. But the collector of customs may exact fees in a class of cases which have no

relation whatever to the collection of duties on imports or have no connection with imported merchandise. This act was clearly not intended to cover such fees and exactions. What follows in the course of the paragraph indicates that the purpose was to restrict this language to cases which had relation to imported merchandise. The remedy providing the method of procedure, the transmission of papers from the customhouse, the effect of the determination by the board, and following upon this the appeal to this court provided for by the subsequent section all indicate a purpose to provide a remedy for persons paying fees, charges, and exactions other than duties in connection with imported merchandise.

The American Express Co.'s case, G. A. 6552 (T. D. 27962), in no way conflicts with the above views. In that case the costs and charges were exacted in connection with imported goods, although the goods had not been entered.

A case much more in point is Czarnecki's case, G. A. 3785 (T. D. 17851). In that case the collector required the payment of a sum for the expense of affixing internal-revenue stamps to unclaimed and abandoned cigarettes. It was held that while the action of the collector amounted to an exaction the board had no jurisdiction over the subject. Referring to section 14 of the act of June 10, 1890, the board said:

The words of section 14 of the act of June 10, 1890, under which this appeal is brought, "and as to all fees and exactions of whatever character," are general and comprehensive. But it is one of the plainest principles of statutory interpretation that the words of a statute are to be understood in the sense in which they best harmonize with the subject of the enactment and the object which the legislature had in view and that all words, if they be general, and not express and precise, are to be restricted to the fitness of the matter; that is, they must be understood as used in reference to the subject matter in the mind of the legislature, and strictly limited to it. (Endlich, secs. 73-86).

Now, the act of June 10, 1890, refers to the importation of merchandise and various incidents relating thereto, and this, and nothing else, was the subject matter in the mind of Congress. We think, therefore, that the fees and exactions which are made appealable by section 14 must relate to imported merchandise and must affect the rate and amount of duty or the costs and charges chargeable thereon.

We can not suppose that Congress intended to give an appeal to this board from a decision of the collector as to fees and exactions made by him in the multifarious duties imposed on him by law under the direction of the Secretary of the Treasury not in any manner relating to the importation of merchandise.

This case was followed by the board in *In re Kelly*, G. A. 3786 (T. D. 17852). See also *In re Baldwin*, G. A. 4283 (T. D. 20129) and *Palm's case*, G. A. 5208 (T. D. 24002).

It is true that the board in the case of *Ezquiaga*, G. A. 4773 (T. D. 22507), took jurisdiction of a protest against exactions of light duties exacted by the collector of San Juan, P. R. While the question of jurisdiction seems not to have been much discussed, jurisdiction in such case was assumed.

The case of *United States v. Hall Coal Co.* (134 Fed., 1003) involved the question of whether the Board of General Appraisers had jurisdiction to determine whether dockage charges were dutiable as a portion of the costs of repairs of a vessel in a foreign port, such dockage charges having been made the subject of assessment by the collector. The court affirmed the jurisdiction, but rested the decision on the distinct ground that Congress had intended to vest the board with jurisdiction to review decisions of the collector as to all collections of duties which he might be legally authorized to impose upon imported merchandise. After quoting the language of section 14, the court adds:

* * * The language just quoted, which is a part of section 14, considered in connection with section 3114, under which the duty was assessed, would seem to be sufficiently comprehensive to clothe the board with power and jurisdiction to review all duties on imports assessed by a collector,

and proceeds to distinguish the case from that of *In re Fassett* (142 U. S., 479), where the subject of the collector's assessment was not liable to duty, and where it was accordingly held that the collector's action was not open to review by the board.

We think the present case falls clearly within the reasoning of *Czarnecki's case*, *supra*, and we do not consider the Hall case an authority sustaining the claim of jurisdiction in this case.

It follows from the views expressed above that the decision of the board denying relief under this protest must be *affirmed*, but without prejudice to the right of the protestants to take any proceedings advised before the proper tribunal.

UNITED STATES v. YOUNGLOVE GROCERY CO. (No. 1360).¹

OLIVE OIL—TINS CONTAINING LESS THAN 5 GALLONS EACH.

The merchandise was olive oil contained in tins, the oil in each container being slightly less than 5 gallons in quantity. *Held*, under paragraph 38 of the tariff act of 1909, the oil was dutiable at 50 cents per gallon as olive oil in tins containing less than 5 gallons each, and this notwithstanding the Treasury regulation of June 20, 1911 (T. D. 31711).

United States Court of Customs Appeals, October 29, 1914.

APPEAL from Board of United States General Appraisers, Abstract 34988 (T. D. 34279.)
[Reversed.]

Bert Hanson, Assistant Attorney General (*Leland N. Wood*, special attorney), for the United States.

Submitted on record by appellee.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MARTIN, Judge, delivered the opinion of the court:

This appeal relates to olive oil which was imported in tins under the tariff act of August 5, 1909.

¹ Reported in T. D. 34878 (27 Treas. Dec., 380).

It is conceded that the importation was dutiable under paragraph 38 of that act, reading as follows:

38. Olive oil, not specially provided for in this section, forty cents per gallon; in bottles, jars, kegs, tins, or other packages, containing less than five gallons each, fifty cents per gallon.

The collector assessed duty upon the oil at the rate of 50 cents per gallon under the latter provision of the foregoing paragraph.

The importers protested against this assessment, claiming duty upon the importation at the rate of 40 cents per gallon under the former provision of the paragraph.

The protest was heard by the Board of General Appraisers and was sustained, from which decision the Government now prosecutes its appeal.

It will be observed that paragraph 38, *supra*, divides olive oil when imported in tins into two classes. One class consists of oil in tins containing less than 5 gallons each; such oil is dutiable at 50 cents per gallon. The other class consists of oil in tins which do not contain less than 5 gallons each; such oil is dutiable at 40 cents per gallon. It has been held by this court in repeated cases that the duty in question is imposed upon the contents of the tins and not upon their capacity. The controlling question therefore is whether the tins in question actually contained less than 5 gallons of olive oil each. If so, the collector's assessment should be sustained. *United States v. Palma* (4 Ct. Cust. Appls., 140; T. D. 33412), *United States v. Sprague* (4 Ct. Cust. Appls., 358; T. D. 33532), *United States v. Moos & Co.* (5 Ct. Cust. Appls., 322; T. D. 34528).

The answer to this question may be found in the report of the local appraiser and likewise in the invoice of the merchandise. The appraiser reported the contents of the imported tins to be 4.9932 gallons each. The invoice stated the contents to be 4.992 plus gallons each. These figures were adopted by the importers themselves in their protest.

It appears therefore that the olive oil was imported in tins containing slightly less than 5 gallons each, and upon the face of the statute the same was dutiable at 50 cents per gallon, as was assessed by the collector in this case.

This decision, however, should not be entered without a consideration of the Treasury regulation published on June 20, 1911, as T. D. 31711, which reads as follows:

TREASURY DEPARTMENT, *June 20, 1911.*

SIR: Referring to your letter of April 21, 1911, further in regard to the assessment of duty upon olive oil in so-called 5-gallon containers, I have to advise you that 30 days from the date hereof the measurement of olive oil in such containers for the purpose of assessing duty thereon shall be as follows:

Representative tins, covering every variation of the capacity of tins in a given shipment, shall be ordered to the appraiser's stores for examination, and the cubical capacity of the tin shall be there found and noted. This finding may be made either by a

measurement of the physical size of the tin and the computation thereof or by weighing all of the contents of the tin and the computation thereon as to the total cubical contents and capacity thereof. In the event this latter method is adopted, care must be taken that the computation is based upon the weight of the oil of the particular tin under consideration, as the statistics show that there is a considerable variation with different brands of olive oil. If the total cubical capacity of the tin is equal to 5 gallons or more and there is an outage of not exceeding 1 per cent, the entire shipment represented by the given tin may be liquidated upon the basis of 40 cents per gallon. If the outage is in excess of 1 per cent, a reasonable number of additional tins from the same shipment shall be examined and the liquidation of the total shipment will be in accordance with the result of such examination. If the result of the examination of additional tins shall show an outage not exceeding 1 per cent, duty will be assessed at the rate of 40 cents per gallon; if the outage is in excess of 1 per cent, duty will be assessed at the rate of 50 cents per gallon upon the actual quantity imported under the provisions of paragraph 38 of the tariff act of August 5, 1909.

Respectfully,
(79883)

JAMES F. CURTIS,
Assistant Secretary.

COLLECTOR OF CUSTOMS, *New York.*

It will be observed that the department in the foregoing instruction directs the collector to assess the lower rate of duty prescribed by paragraph 38 upon all tins of olive oil which have a capacity of 5 gallons whose contents do not fall short of that measurement by more than 1 per cent. The present importation comes within that description. The effect of this regulation is to establish an allowable outage of 1 per cent in such cases and thereby to alter to that extent the limitation fixed by Congress in the terms of the paragraph itself. This regulation, therefore, if enforced, would not result in giving effect to the terms of the statute as enacted, but to the contrary it would alter or amend the same. No special authority for this action by the department appears in the act, and it seems clear that such authority is not within the general powers of the department. The line of demarkation between the two rates of duty was unconditionally fixed by the terms of the act, and only legislative authority can either raise or lower the same. The regulation of June 20, 1911, is therefore held to be invalid. *Ullman v. United States* (1 Ct. Cust. Appls., 61, 63; T. D. 31032), *Tracy v. Swartwout* (10 Pet., 80, 99), *Knoedler v. United States* (113 Fed., 999), *Morrill v. Jones* (106 U. S., 466).

It may be argued that the contents of the tins now in question fall so slightly below 5 gallons as to bring the case within the rule of *de minimis* and to justify the assessment of the lower rate of duty nevertheless. In answer to this, however, it should be noted that the dividing line between the two classes of tins has been fixed by Congress with certainty and exactness, and this legislative purpose must be given certain and exact effect. Otherwise a variable and discretionary demarkation would replace the inflexible one prescribed by the act itself. Furthermore, it is no more permissible to assess the lower rate of duty upon tins which are slightly under 5 gallons in

contents than it would be to assess the higher rate of duty upon tins which are slightly over 5 gallons in contents. The rule of *de minimis* therefore does not apply to the present provision. *Vandegrift v. United States* (3 Ct. Cust. Appls., 176, 178; T. D. 32462), *Greenbaum's case*, G. A. 1785 (T. D. 13483), *United States v. Leuder* (154 Fed., 1).

The decision of the board is accordingly *reversed*.

S. BAN Co. *et al.* v. UNITED STATES (No. 1361).¹

RICE WINE OR SAKE AND LEAKAGE.

It appears there had been leakage *in transitu* from some of the tubs of this importation. But section 307, tariff act of 1909, specifically provided that rice wine or sake should enjoy no constructive or other allowance for breakage, leakage, or damage during transportation—*Furuya & Co. v. United States* (2 Ct. Cust. Appls., 37; T. D. 32085).

United States Court of Customs Appeals, October 29, 1914.

APPEAL from Board of United States General Appraisers, Abstract 34745 (T. D. 34165).

[Affirmed.]

B. A. Levett for appellant.

Bert Hanson, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MARTIN, Judge, delivered the opinion of the court:

The merchandise in this case consists of sake or Japanese rice wine, which was imported under the tariff act of August 5, 1909. The present issue relates solely to the quantity of sake upon which duty was assessed by the collector and not to the rate of duty which was assessed.

The entire importation comprised 256 tubs of sake. The collector assessed duty upon the capacity of the several containers as returned by the gauger, less an allowance of $2\frac{1}{2}$ per cent for wantage, in accordance with the Treasury regulation of June 27, 1905, published as T. D. 26547.

The importers protested against this assessment in the case of 30 of the imported tubs, claiming that the actual contents of these at importation were only 527.50 gallons, whereas under the rule adopted by the collector they were assessed at 570.40 gallons. The importers contended that duty should be assessed upon only the actual contents of the containers at importation and not upon their capacity.

The protest was submitted to the Board of General Appraisers and was overruled. The importers now appeal from that decision.

The record contains the testimony which was submitted to the board at the trial, and it fairly appears therefrom that the actual

¹ Reported in T. D. 34874 (27 Treas. Dec., 383).

contents of the 30 containers at importation were less than their capacity to the extent claimed by the importers. The protest, however, does not attempt to state the origin or explanation of this shortage, and the testimony upon that subject is not entirely convincing. Nevertheless the evidence gives probability to the theory that the containers in question were substantially full at exportation and lost a part of their contents by leakage while *in transitu*. It also appears probable that the allowance of 2½ per cent for normal wantage was sufficient to cover any actual shortage in the contents of the containers at the time of exportation. The present record therefore presents a question of leakage and not one of nonshipment.

Upon the foregoing interpretation of the record the present case falls directly within the rule established by paragraph 307 of the tariff act of 1909, the pertinent parts of which read as follows:

307. Still wines, including ginger wine or ginger cordials, vermouth, and rice wine or sake, and similar beverages not specially provided for in this section, in casks or packages other than bottles or jugs, if containing fourteen per centum or less of absolute alcohol, forty-five cents per gallon; * * *. *And provided further*, That there shall be no constructive or other allowance for breakage, leakage, or damage on wines, liquors, cordials, or distilled spirits. * * *

In the foregoing paragraph of the tariff act of 1909 Congress gave to sake the status of a still wine, and specifically provided that it should enjoy no constructive or other allowance for breakage, leakage, or damage during transportation. A different rule had obtained under the tariff act of 1897, wherein sake was not provided for *eo nomine*, but was left to assessment by similitude only. *Peacock & Co. v. United States* (2 Ct. Cust. Appls., 305; T. D. 32095).

In deciding an issue identical with the present one, under the tariff act of 1909, in the case of *Furuya & Co. v. United States* (2 Ct. Cust. Appls., 371; T. D. 32095), this court said:

The present tariff law (1909) is the first one which has fixed a rate of duty to be levied upon sake *eo nomine*. Under former acts that article was the subject of much litigation and there are many reported decisions relating to it. However, in the act of 1909, as appears by the above copy, sake was placed by name in the still-wine paragraph, and is therein called rice wine or sake. It nowhere distinctly appears that these two names apply only to the same identical article; that is, that they are exact synonyms. There may, indeed, be other kinds of rice wine besides sake; but the language of the act and the references to the article appearing in published cases make it safe to assume that the term "rice wine" at least includes sake, and that it is so used in the paragraph. As appears above, there follows in the same paragraph an express provision that there shall be no constructive or other allowance for leakage on wines. The question therefore arises whether there can be any allowance under the act for leakage of sake in transit in view of the provision that there shall be no allowance for leakage on wines.

Sake is made from rice by a process of fermentation, and grapes do not enter at all into its composition. In the ordinary use of terms, therefore, sake would not be called a wine. Under prior tariff acts it was held to be dutiable by similitude at the same rate as still wines. But in the present act it is specially placed within the still-wine

paragraph and expressly named therein as a wine. In the nomenclature adopted by the paragraph, therefore, it becomes a kind of wine, whether it would ordinarily be so designated or not. This description of sake as a kind of wine is followed in the paragraph by the provision that there shall be no allowance for leakage on wines. It seems, therefore, to be a reasonable and natural interpretation of these provisions taken together to hold that one of the wines on which there shall be no allowance for leakage is the kind of wine also called sake, which is expressly named as a wine in the preceding recital of the paragraph. This seems, indeed, to be the very purpose for which the name rice wine was used in the paragraph, for there was otherwise no need of making the meaning of the word sake more definite by the use of such an explanatory alternative name. In the tariff vocabulary of mercantile terms sake had come certainly to have even a prominent place; there was no uncertainty as to the article to which that name applied. The alternative name, rice wine, therefore, seems to have been used for the purpose of adding that much to the original meaning of the term, namely, that for the purpose of the paragraph sake was to be considered as a kind of wine and to be included within any of its provisions which applied generally to wines.

In accordance with the ruling in the *Furuya* case, *supra*, the decision of the board in the present case is *affirmed*.

SUSSFELD, LORSCH & Co. v. UNITED STATES (No. 1403).¹

SMALL CHEAP COMPASSES WITH NEEDLE AND DIAL.

It is agreed these goods, of chief value in brass, were improperly assessed by the collector. From the testimony and the exhibits themselves it appears these articles are not intended for use as parts of watches or watchcases or as field glasses, and they are not jewelry or parts thereof. They are intended to be used as a part of something else and were dutiable as articles or wares not specially provided for composed wholly or in part of metal under paragraph 199, act of 1909.

United States Court of Customs Appeals, October 29, 1914.

APPEAL from Board of United States General Appraisers, Abstract 35167 (T. D. 34307).
[Reversed.]

Curie, Smith & Maxwell (Thomas M. Lane of counsel) for appellants.

Bert Hanson, Assistant Attorney General (*Leland N. Wood*, special attorney on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

BARBER, Judge, delivered the opinion of the court:

The undisputed facts here are as follows: In March, 1913, the importers entered at the port of New York certain merchandise evidently described by the appraiser as parts of watch charms in the form of compasses, composed in chief value of brass, valued at over 72 cents per gross, and upon which the collector, in accordance with the appraiser's return, assessed duty at 75 per cent ad valorem under paragraph 448 of the tariff act of 1909. Liquidation was had at this rate in May of the same year.

The protests were duly filed in June following, and within 30 days thereafter were with the papers in the case transmitted to the Board of General Appraisers for determination.

¹ Reported in T. D. 34875 (27 Treas. Dec., 385).

These papers indicate that Mr. Higgins was the appraiser and Mr. Rosenberg the examiner who attended to the examination and appraisal of these importations.

At the hearing before the board the only testimony offered was by the importers, who called but one witness, Mr. Bowen, who testified that he was a customs examiner and passed the merchandise. He was shown two samples which are before us and which he testified were representatives of these shipments. These are small, apparently cheap compasses with needle and dial, on which the cardinal points and some intermediate points are indicated; degrees, however, are not shown. He testified that they were used in field-glass cases, also on the backs of watches, and other instruments; that perhaps they were capable of being used as watch charms, but he had not seen them so used; that he returned them for duty at 75 per cent ad valorem under paragraph 448 as materials of brass, and importers conceded before the board that these compasses are in chief value of brass. The evidence of the witness as to the use of these compasses seems to rest upon his observation as to the articles in which he has seen them in use.

In its opinion the board said the importers claimed the merchandise dutiable under paragraphs 109 and 199 of the same act. It further said that the testimony was clear that these compasses were used in field-glass cases, also on the backs of watches and other instruments, and not used as watch charms except in rare cases.

The opinion then states that the merchandise "more properly falls within the designation of paragraph 448 of said act for 'articles of every description finished or partly finished * * * composed * * * in chief value of * * * brass, * * * designed to be carried on or about or attached to the person,'" rather than under the clause therein providing for "all stampings * * * suitable for use in the manufacture of the foregoing articles (charms)." The board held the merchandise was not dutiable as claimed by importers and while not agreeing with the collector's classification declined to disturb it and overruled the protests.

In this court the importers contend that these compasses are dutiable at 45 per cent ad valorem as articles or wares not specially provided for composed wholly or in part of metal under paragraph 199 of the act, as claimed in their protest, and urge that the board's statement that the merchandise is articles designed to be carried on or about or attached to the person is in absolute conflict with the evidence and its own finding of fact as to the uses to which they are devoted.

The Government does not claim the assessment made by the collector was correct, but contends that these compasses are dutiable under the part of paragraph 448 held applicable by the board. We

here insert the material parts of that paragraph conveniently subdivided for the purposes of this case:

(a) Chains, * * * charms, * * * together with all other articles * * * finished or partly finished, * * * or composed wholly or in chief value of * * * brass, * * * and designed to be worn on apparel or carried on or about or attached to the person. * * *

(b) All stampings and materials of metal (except iron and steel) or of metal set with glass or paste, finished or partly finished, suitable for use in the manufacture of any of the foregoing articles. * * *

In view of the evidence, we accept as correct the finding of the board that these compasses are used in field-glass cases and on the backs of watches and other instruments, and they are in chief value of brass. We do not know what "other instruments" were referred to by the witness, but it must be assumed that they are instruments of utility rather than ornament. The word instrument is consistent only with that understanding.

Under this state of facts the question is, Under what paragraph are they dutiable? They are not, under the finding of the board, watch charms or parts thereof, neither are they, do we think, within the meaning of the first part of paragraph 448, designed to be worn on apparel or carried on or about or attached to the person.

These compasses, so far as the evidence discloses and so far as we can judge from their appearance, are themselves finished, but their condition, as well as the evidence, indicates that they are to become a part of something else. There is no hole, eyelet, or other provision in the rim or elsewhere by means of which they can be attached to something else, but apparently they are designed to be set or fastened *into* some other article, whatever it may be. In other words, while complete of themselves they are intended to be a part of something else, and we think, of themselves, they are not designed to be worn on apparel or carried on or about or attached to the person. If they are subsequently so used, it is because that use attaches to the articles of which they may later become a part.

The first part of paragraph 448 relates wholly to chains, pins, collar, cuff, and dress buttons, charms, combs, millinery or military ornaments, and other articles not *eo nomine* named, all of which would seem to be articles chiefly for ornament rather than utility, and we think these compasses or the field-glass cases, watches, or other instruments of which they are to become a part are not within the intendment of that part of the paragraph.

The testimony of the witness is to the effect that these compasses, one sample of which has a thickness of some three-eighths of an inch with a diameter of some five-eighths of an inch, while the other is somewhat less in these respective measurements, are, among other things, designed to be set in the backs of watches. Assuming this, although such a use would hardly seem to be common, we do not

think they are parts of watches or watchcases within the meaning of paragraph 112, because their use is foreign to the use and purpose of watches or their cases, and the same observations hold true regarding their use testified to by the witness as parts of field-glass cases. Field glasses are specifically dutiable under paragraph 108; their cases are not mentioned therein and if these compasses become parts of field-glass cases they do not seem to fall within the meaning of paragraph 108.

These observations, we think, all lead to the conclusion, and the only one that can be reached upon the evidence in this case in view of the exhibits, namely, that these cheaply constructed compasses, designed as they are to be a part of something else, although finished of themselves, are dutiable at 45 per cent ad valorem as manufactures of metal under paragraph 199, as claimed by the importers.

The Government suggests that the evidence hardly warrants the conclusion that these compasses are not to be devoted to the use mentioned in the first part of paragraph 448, but we think it can not, in view of the entire record and the exhibits, be otherwise held.

The Government somewhat urges that these compasses are commonly or commercially known as jewelry or parts thereof. There is no evidence of commercial designation and, whether they are parts of watchcases or parts of field-glass cases or other instruments, we do not feel warranted, on the record and exhibits, to hold that they are, in common understanding, jewelry or parts thereof.

The result is that we conclude this merchandise is dutiable under paragraph 199 and that the judgment of the Board of General Appraisers ought to be, and is, *reversed*.

GIBSON ART CO. v. UNITED STATES (No. 1407).¹

LABELS.

The Christmas seals of the importation are used during the Christmas holidays by attaching them indiscriminately to all kinds of packages, regardless of the contents of these. They are not properly labels, and are not dutiable as such under paragraph 412, tariff act of 1909.

United States Court of Customs Appeals, October 29, 1914.

APPEAL from Board of United States General Appraisers, Abstract 34946 (T. D. 34247).

[Reversed.]

Allan R. Brown for appellant.

Bert Hanson, Assistant Attorney General (*Thomas J. Doherty*, special attorney, on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MARTIN, Judge, delivered the opinion of the court:

The merchandise involved in this appeal consists of small paper disks, one kind being 1½ inches in diameter, the other being seven-

¹ Reported in T. D. 34876 (27 Treas. Dec., 388).

eighths of an inch in diameter. One of these kinds is embossed with a picture of a fir tree and the other with a picture of holly leaves and berries, both bearing the inscription "Merry Christmas." The tree and the leaves of the pictures are in green, the berries and outside borders being in red.

In the appraiser's official report upon the merchandise it is stated that "the merchandise is commonly known as Christmas seals, used in the decoration and sealing of Christmas packages and letters."

The merchandise was classified by the collector as "labels lithographically printed in less than eight colors, embossed or die-cut," within the terms of paragraph 412 of the tariff act of 1909, and accordingly duty was assessed thereon at the rate of 30 cents per pound.

The importers protested against the assessment, contending that the articles in question were not "labels," and claiming assessment at the rate of 20 cents per pound under the provision in the same paragraph for all other articles not therein specifically provided for and not exceeding eight one-thousandths of an inch in thickness.

The protest was heard by the Board of General Appraisers and was overruled, from which decision the present appeal is prosecuted by the importers.

The following is a copy of the pertinent parts of paragraph 412 of the tariff act of 1909:

412. Pictures, calendars, cards, labels, flaps, cigar bands, placards, and other articles, composed wholly or in chief value of paper, lithographically printed in whole or in part from stone, metal, or material other than gelatin * * *, shall pay duty at the following rates: Labels and flaps, printed in less than eight colors (bronze printing to be counted as two colors), but not printed in whole or in part in metal leaf, twenty cents per pound; cigar bands of the same number of colors and printings, thirty cents per pound; * * * all labels, flaps, and bands not exceeding ten square inches cutting size in dimensions, if embossed or die-cut, shall pay the same rate of duty as hereinbefore provided for cigar bands of the same number of colors and printings * * *; all other articles than those hereinbefore specifically provided for in this paragraph, not exceeding eight one-thousandths of one inch in thickness, twenty cents per pound; * * *.

It will be seen therefore that the sole question now in issue is whether the importations are "labels" under paragraph 412, *supra*. If the articles are such labels they would be dutiable under the paragraph at 30 cents per pound, as assessed. On the other hand, if the articles are not such labels they would be dutiable under the paragraph at 20 cents per pound, as claimed by the importers. No testimony at all was submitted to the board at the trial; therefore the statutory term "label" must be given its ordinary and usual signification in the consideration of the present case. The question therefore is, whether the present articles are "labels" in the common acceptance of that term.

In deciding such an issue the court must rely upon its common knowledge of the language, and should also consult those standard

authorities which seek to express and preserve the common knowledge upon that subject. The following quotations from dictionaries and like authorities are therefore given as aids in ascertaining the common signification of the term in question:

Label.—A slip of paper or any other material, bearing a name, title, address, or the like, affixed to something to indicate its nature, contents, ownership, destination, or other particulars.—*Century*.

Label.—A narrow slip of silk, paper, etc., affixed to anything, denoting its contents; ownership, or the like; as, the label of a bottle or a package.—*Webster*.

Label.—A slip or tag of paper or other material affixed to something and bearing an inscription to indicate its character, ownership, or destination.—*Standard*.

Label.—A small piece of paper, or other material, containing a name, title, or description, and affixed to anything to indicate its nature or contents.—*Worcester*.

Label.—A slip of paper, cardboard, metal, etc., attached or intended to be attached to an object and bearing its name, description, or destination. (The chief current sense).—*Oxford*.

Label.—(A French word, now represented by *lambeau*, possibly a variant; it is of obscure origin and may be connected with a Teutonic word appearing in the English "lap," a flap or fold), a slip, ticket, or card of paper, metal, or other material, attached to an object, such as a parcel, bottle, etc., and containing a name, address, description, or other information for the purpose of identification. * * * —*Encyclopædia Britannica*.

Label.— * * * (c) The usual meaning now, a strip or small piece of paper, sheet metal, cloth, or other material, attached to a package to describe it in some way, as to tell its nature, the maker, the weight, destination, or any other information concerning it. * * * —*International Encyclopædia*.

Label.—A placard or slip attached to an object to denote its contents, destination, or ownership; a slip of paper or any other material bearing a name, title, address, or the like, affixed to something to indicate its nature, contents, ownership, destination, or other particulars; a small piece of paper, or other material, containing the name, title, or description, and affixed to indicate its nature or contents; a narrow slip of silk, paper, parchment, etc., affixed to anything denoting its contents, ownership, and the like.—*Cyclopedia of Law and Procedure*.

A trade-mark may, sometimes, it is true, in form, serve as a label, but it differs from a mere label in such cases in that it is not confined to a designation of the article to which it is attached, but by its words or design is a symbol or device which, affixed to a product of one's manufacture, distinguishes it from articles of the same general nature manufactured or sold by others, thus securing to the producer the benefits of any increased sale by reason of any peculiar excellence he may have given it. *Manufacturing Co. v. Trainer* (101 U. S., 51, 53). A mere label is not intended to accomplish any such purpose, but only to indicate the article contained in the bottle, package, or box to which it is affixed.—*Mr. Justice Field in Higgins v. Keuffel* (140 U. S., 428, 433).

The authorities just cited agree with remarkable unanimity upon the definition of the term in question, and accordingly the name is held to signify a strip or small piece of paper, sheet metal, cloth, or other material attached to a package or article to describe it in some way, as by telling its nature, the name of the maker, its weight, destination, or some other information concerning it.

The foregoing definition seems to furnish a clear answer to the present inquiry. For the Christmas seals now in question are placed upon letters, parcels, and articles during the holidays as

mere ornaments appropriate to the season and expressive of its spirit of cheer and good will, and are not designed at all for any utilitarian purpose. They may, indeed, serve in some measure to secure or seal up the package upon which they are placed, but such a use does not tend to establish their identity as labels, for they bear no relation at all to the character of the article or package upon which they may be placed, nor to the name of the maker thereof, nor to the use of the article, its weight, its value, its destination, its consignee, or any other fact concerning the same. As is well known, such seals are placed indiscriminately during the holidays upon all kinds of packages regardless of the character of their contents or of the transactions in which they appear; upon gifts, and also upon vended wares; upon articles of great value and also upon cheap and commonplace goods; upon packages passing between relatives and friends and also upon those passing between casual vendors and vendees. In fact, the use of such seals upon articles or packages signifies little more than that it is Christmas time, and this does not bring the seal within any one of the foregoing definitions of the term "label." To extend that term so as to include this article would be a distinct enlargement of its well-defined common acceptance.

In this view of the case the decision of the board is *reversed* and reliquidation is ordered.

UNITED STATES *v.* KAGAWA & Co. *et al.* (No. 1321).¹

1. PRESERVED.

When fish are dried, whether by means of the heat of the sun or otherwise, being thereby saved from decomposition for a substantial period of time, they are "preserved" within the common meaning of that term.

2. KAZUNOKO—FISH ROE.

The term "preserved" in paragraph 270, tariff act of 1909, does not bear a restricted interpretation, and the provision there for "caviar, and other preserved roe of fish" was intended to classify all fish roe, which had been treated in any manner for preservation for food purposes, as preserved fish roe.

United States Court of Customs Appeals, November 18, 1914.

APPEAL from Board of United States General Appraisers, G. A. 7507 (T. D. 33911).
[Reversed.]

Bert Hanson, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, of counsel; *Frank L. Lawrence*, special attorney, on the brief), for the United States.

William Hayward for appellee.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MARTIN, Judge, delivered the opinion of the court:

The merchandise in this case was imported from Japan under the tariff act of 1909. It is called "Kazunoko" and consists of the roe of the herring in a dried condition.

¹ Reported in T. D. 34934 (27 Treas. Dec., 507).

The collector classified the article as preserved fish roe, dutiable as such under paragraph 270 of the act, and accordingly assessed the same with duty at the rate of 30 per cent ad valorem.

The importers protested against the assessment, claiming free entry for the merchandise as fish eggs under paragraph 560 of the act.

The protest was submitted to the Board of General Appraisers and was sustained, from which decision the Government now appeals.

The following is a copy of the two competing paragraphs above cited:

270. Fish (except shellfish) by whatever name known, packed in oil, in bottles, jars, kegs, tin boxes, or cans, shall be dutiable as follows: When in packages containing seven and one-half cubic inches or less, one and one-half cents per bottle, jar, keg, box, or can; containing more than seven and one-half and not more than twenty-one cubic inches, two and one-half cents per bottle, jar, keg, box, or can; containing more than twenty-one and not more than thirty-three cubic inches, five cents per bottle, jar, keg, box, or can; containing more than thirty-three and not more than seventy cubic inches, ten cents per bottle, jar, keg, box, or can; all other fish (except shellfish) in tin packages, thirty per centum ad valorem; fish in packages, containing less than one-half barrel, and not specially provided for in this section, thirty per centum ad valorem; caviar, and other preserved roe of fish, thirty per centum ad valorem.

560. Eggs of birds, fish, and insects (except fish roe preserved for food purposes): *Provided, however,* That the importation of eggs of game birds or eggs of birds not used for food, except specimens for scientific collections, is prohibited: *Provided further,* That the importation of eggs of game birds for purposes of propagation is hereby authorized, under rules and regulations to be prescribed by the Secretary of the Treasury.

It may be repeated that the present issue is whether the merchandise in question is dutiable under the provision for preserved fish roe appearing in the last clause of paragraph 270, or is entitled to free entry under the provision for fish eggs in paragraph 560, both above copied.

It appears from the testimony that the present article comes from the island of Hokido, Japan, and is prepared during a season of the year when there is no rainfall there. The roe is taken from the herring and is spread thinly upon mats to be dried by the wind and sunshine. These mats are moved or turned at intervals, and after about two weeks of this treatment the roe is thoroughly dried. No preservative substance of any kind is applied to the roe, the sole drying agencies being the sunshine and the wind; but if the roe were not thus purposely exposed to the action of these agencies it would quickly spoil. When thus dried the roe is edible, and will keep without spoiling for two or three years; but the crop of the same year is preferred for consumption. According to Japanese custom the article is eaten only about the beginning of the new year. At that time the dried roe is soaked in water, "shoyu" is poured upon it, and it is eaten as a food appropriate to the season.

As appears from the foregoing statement the sole question in the case is whether the herring roe, thus dried for food purposes, is

"preserved" within the meaning of paragraphs 270 and 560 above quoted.

It is within common knowledge that the word "preserved" bears a general signification which is quite broad enough to include a process like that above described. In relation especially to fish and meat the term in question was early applied to processes of drying alone.

The following quotations tend to sustain this statement:

Encyclopædia Britannica:

Food preservation.— * * * Preservation by drying. * * * By the removal of water the most perishable materials, like meat or eggs, can be rendered unchangeable, except so far as the inevitable oxidation of the fatty substances contained in them is concerned and which is independent of life action. The drying of meat, upon which a generation ago inventors bestowed a great deal of attention, has become almost obsolete, except for comparatively small articles or animals, like ox tongues or tails and fish. * * *

International Encyclopædia:

Food, preservation of.—* * * Desiccation is probably the oldest, as it is the simplest method of preserving fruits, vegetables, and even meats from decay. As organic life requires moisture, the thorough drying of the food checks its growth. This was first done in the sun or by the fire. * * *

Johnson & North case, G. A. 1250 (T. D. 12566), before the Board of General Appraisers (1892):

LUNT, *General Appraiser.* * * * The most ancient and common methods of preserving fish are by drying, salting, smoking, and pickling. * * *

It may be accepted without further authority that when fish are dried, whether by means of the heat of the sun or by other means, and are thereby saved from decomposition for a substantial period of time, they may properly be said to be "preserved" within the common meaning of that term. There is nothing in the paragraphs now under review which would indicate that Congress intended the word as therein used to bear a restricted interpretation. Indeed a reading and comparison of the provisions in question lead to the opposite conclusion.

In considering this issue it may be well also to review briefly the history of the provisions in question.

In the tariff act of October 1, 1890, eggs were made dutiable by the dozen, and smoked, dried, salted, pickled, and frozen fish by the pound, both by *eo nomine* provisions, there being in the act however, no dutiable provision *eo nomine* for fish roe. In that act for the first time appeared the prototype of the free-list paragraph now in question, the same appearing without exception or proviso of any kind and reading simply as follows:

(Free list.) 561. Eggs of birds, fish, and insects.

Under this act, in the Sheldon case, G. A. 372 (1891) (T. D. 10877), the Board of General Appraisers held that caviar, salted and packed in tins, was entitled to free entry as eggs of fish, saying:

There is no limitation imposed upon the kind of fish eggs in paragraph 561, or whether fresh, pickled or preserved.

The act of August 27, 1894, contained no substantial amendment relating to the present subject, paragraph 471 of that act simply repeating the free-list provision of the preceding act for eggs of birds, fish, and insects. Under this act, in the Bock case, G. A. 2897 (1895) (T. D. 15716), the Board of General Appraisers held that canned cod roe packed in hermetically sealed tins and processed for preservation was entitled to free entry as fish eggs, saying:

There is nothing in paragraph 471 which limits the free entry of fish eggs to such as are capable of being hatched. Although these eggs have been subjected to heat in processing and are designed for use as a delicate article of food, still they have not lost their identity as fish eggs and therefore the protest must be sustained.

In the tariff act of July 24, 1897, duty was again laid *eo nomine* upon eggs and also upon smoked, salted, pickled, and frozen fish, but again there was no dutiable provision for fish roe *eo nomine*. However, the free-list provision was substantially amended, appearing in the following terms:

549. Eggs of birds, fish, and insects: *Provided, however,* That this shall not be held to include the eggs of game birds or eggs of birds not used for food, the importation of which is prohibited except specimens for scientific collections, nor fish roe preserved for food purposes.

This was the first enactment of the exception for "fish roe preserved for food purposes," as part of the free-list provision, but, as already stated, no correlative amendment for a duty upon such preserved fish roe *eo nomine* appeared in the dutiable provisions of the act. The following decisions relate to that act:

In the Odo case, G. A. 5120 (1902) (T. D. 23657), the Board of General Appraisers held that canned fish roe processed with heat and packed in hermetically sealed cans for food purposes was not entitled to free entry under paragraph 549 of that act as eggs of fish, but was dutiable as a nonenumerated manufactured article. The board refused to sustain the Government's contention for an assessment of the article by similitude with dried fish, saying:

It is a manufactured product in that it has been prepared and brought into condition suitable for food; and it is not enumerated in any of the schedules of the tariff act. We find that this merchandise is fish roe preserved for food purposes, and hold that it is a nonenumerated manufactured article. * * *

In the Kojima case, G. A. 5424 (1903) (T. D. 24682), the Board of General Appraisers, dealing with "dried fish roe packed in tins," overruled the decision just above cited and held that the merchandise was dutiable by similitude with fish in tins and not as a nonenumerated manufactured article.

In the Harper case, Abstract 16731 (1907) (T. D. 28409), the merchandise being "dried fish eggs," the Board of General Appraisers held the article to be dutiable by similitude with "fish, dried," and sustained an assessment to that effect.

The three decisions under the tariff act of 1897 which have just been severally cited all relate to fish roe which was dried by processing, and all held the same to be within the exception which excludes "fish roe preserved for food purposes" from the free list of the tariff act of 1897, although differing in the classification of the same for duty under that act. See also the Benson case, Abstract 1237 (T. D. 25261), *Menzel v. United States* (135 Fed., 918; T. D. 25875), same case (142 Fed., 1038; T. D. 27118), the Tasker case, Abstract 10410 (T. D. 27209) (this case relating to inedible fish roe), and the case of Commission Co., Abstract 33842 (T. D. 33795).

At the tariff revision of 1909 the free-list provision for fish eggs excepting "fish roe preserved for food purposes" was reenacted in substantially the same form as in the act of 1897, and a corresponding provision for duty upon "caviar, and other preserved roe of fish" was added to the fish schedule, as appears by the copies of paragraphs 270 and 560 above given.

The decisions under the act of 1897 above cited tend strongly to sustain the Government's contention in this case. Those decisions all held that fish roe dried by heat processing was dutiable as "preserved fish roe" under the provisions in question, and the decisions in question were all published before the tariff revision of 1909. No emphasis was laid in any of these decisions upon the methods whereby the fish roe in question had been dried; in some of the cases the merchandise was simply described as "dried fish roe." It is therefore reasonable to believe that in the tariff revision of 1909 the same term was employed by Congress with the same meaning, and that it was intended to cover fish roe which had been dried, regardless of the processes employed in drying the same.

This view finds further confirmation in the unqualified use of the word "caviar" in the dutiable provision of the act of 1909, whereby all caviar prepared for food purposes was made dutiable regardless of the extent to which it had been advanced in condition prior to importation. See *Hansen v. United States* (1 Ct. Cust. Appls., 1; T. D. 30769); *United States v. American Express Co.* (2 Ct. Cust. Appls., 95; T. D. 31636). By this provision for "caviar, and other preserved roe of fish," Congress evidently intended to classify all fish roe which had been treated in any manner for preservation for food purposes as preserved fish roe and to subject the same to duty as such under the fish schedule.

In this view of the case the decision of the board is *reversed*.

STEGEMANN, JR., v. UNITED STATES (No. 1358).¹

1. MARQUARDT-MASSE.

The importer claims the merchandise is made of Marquardt-Masse. This term is not in common use and no authority is given that sheds any light on the question of what Marquardt-Masse is, of what it is composed, or how made. The record shows no chemical analysis of the tubes in controversy.

2. AN AFFIRMATIVE SHOWING HERE REQUIRED OF IMPORTER.

The importer's contention is that the tubes were not dutiable under paragraph 94, but paragraph 95, tariff act of 1909. The burden is on him of establishing both these claims. Under the evidence if it were assumed the first contention is sound there is no proof of the other.

United States Court of Customs Appeals, November 18, 1914.

APPEAL from Board of United States General Appraisers, Abstract 34606 (T. D. 34127).

[Affirmed.]

Comstock & Washburn for appellant

Bert Hanson, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, of counsel), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

BARBER, Judge, delivered the opinion of the court:

The question here is the proper rate of duty upon certain pyrometer tubes of different lengths. These tubes are used in the manufacture of apparatus for high temperature measurements. When used in furnaces they penetrate the roof or side walls and extend into the heated zone. There were three importations, one was assessed as plain porcelain, another as white china, and the other as white porcelain, all at the rate of 55 per cent ad valorem under paragraph 94 of the tariff act of 1909. It is stipulated, however, that the merchandise involved in all these protests is of the same kind and that the record, testimony, and exhibits as to one protest may be accepted in evidence as a part of the record as to the others.

The importer claims duty should have been taken at the rate of 35 per cent ad valorem under paragraph 95 of the same act. We insert here the respective paragraphs:

94. China, porcelain, parian, bisque, earthen, stone and crockery ware, plain white, plain brown, including clock cases with or without movements, pill tiles, plaques, ornaments, toys, charms, vases, statues, statuettes, mugs, cups, steins, and lamps, all the foregoing wholly or in chief value of such ware, not painted, colored, tinted, stained, enameled, gilded, printed, or ornamented or decorated in any manner; and manufactures in chief value of such ware not specially provided for in this section, fifty-five per centum ad valorem.

95. Articles and wares composed wholly or in chief value of earthy or mineral substances, not specially provided for in this section, whether susceptible of decoration or not, if not decorated in any manner, thirty-five per centum ad valorem; if deco-

¹ Reported in T. D. 34935 (27 Treas. Dec., 512).

rated, forty-five per centum ad valorem; carbon, not specially provided for in this section, twenty per centum ad valorem; electrodes, brushes, plates, and disks, all the foregoing composed wholly or in chief value of carbon, thirty per centum ad valorem.

At the hearing before the board but one witness, Mr. Wilson, the owner of the Wilson-Mauellen Co., for whose benefit the importations were made, was called. Testifying in his own behalf, he said, in substance, that these tubes were made of Marquardt-Masse, a substance known, he said, all over the world for many years as the only material of this general character that would stand a very high temperature and not melt; that Marquardt-Masse was not porcelain; that porcelain was used by makers of lower temperature pyrometers; that porcelain would not stand the high heat attempted to be measured by those he manufactured. He produced a sample of a porcelain tube, which he testified by its trade-mark showed it had been made by the same works which made "all grades of porcelain Marquardt fire clay refractory," which was admitted in evidence as an illustrative exhibit. Comparing the two, he said the importations were more porous than the illustrative exhibit; that the porcelain tube was a glazed material; that all true porcelain gives a glaze as the result, while the imported tubes, excepting the flanges at one end thereof which had not been subjected to the treatment, had a coating of glazing material, had been covered in a glazing material without resulting in actually glazing the same on account of the fact that the glaze had been largely absorbed; that he did not think they were glazed, but they had been rendered less porous by a glazing material; that he could say definitely from its appearance and physical properties that the imported merchandise was not porcelain, but he could not say what it was; that one reason why he was satisfied it was not porcelain was its porosity, but that its smelting point was the chief reason; that he used the term "porcelain" as meaning a material offered to him as porcelain tubes by makers thereof and as meaning material which had been sold as porcelain for any purpose he had ever run across; that he was not a potter or china maker at all. He further testified that these pyrometer tubes were never ornamented or decorated in any way; that he would not imagine anyone would decorate a tube to be used on the inside of a high temperature furnace; that the Marquardt-Masse more nearly approached fire clay than porcelain.

Upon this evidence the Board of General Appraisers overruled the protest, saying, among other things, that although the witness had testified the articles were not porcelain he was unable to state what they were and as the paragraph *eo nomine* provided for china, porcelain, parian, bisque, earthen, stone and crockery ware, the testimony of the witness was insufficient to base thereon a different

classification, and insufficient to enable them to definitely determine that the merchandise was not properly classified by the collector.

Upon the question as to whether or not the merchandise is porcelain or some other of the wares named in paragraph 94, the board has in effect failed to find that the importation is not one of these wares. Doubtless in considering the weight to be given to the importer's evidence on this question the board has taken into consideration the qualifications of the witness to testify upon the subject as well as what he said relating thereto.

It appears he is not a potter or china maker; that he uses the word "porcelain" as meaning the material sold as such for any purpose he has ever run across, which it is apparent refers chiefly if not entirely to porcelain tubes. He expressly states that he does not know what the merchandise is other than that it is Marquardt-Masse, a substance of which he says "it has been known all over the world for many years as the only material that will stand a very high temperature and not melt, of this general character that would be refractory."

In the argument in this court no citation is made to any authority which treats of Marquardt-Masse, nor have we found the term used in any dictionary or technical work. Lexicographers and technical writers mention so many varieties of porcelain, with varying characteristics, that the board may well have doubted if the evidence of the witness was sufficient to establish, as against the presumed correctness of the collector's classification, that these tubes are not of porcelain or of some other of the materials mentioned in paragraph 94.

The importer contends that under the authority of *United States v. Fensterer* (2 Ct. Cust. Appls., 368; T. D. 32094) this merchandise is not within the scope of paragraph 94, because it is not susceptible of decoration. In this connection it is conceded, as the fact is, that there is ample space and opportunity to decorate these tubes, but it is urged that, in a commercial sense, such decoration or ornamentation is practically unknown because of the use to which these tubes are devoted.

A discussion of this question, however, seems unnecessary to the disposition of the case. The importer claims that the merchandise is *not* dutiable under paragraph 94 and *is* dutiable under paragraph 95. The burden is upon him of establishing both these claims. *Benjamin Iron & Steel Co. v. United States* (2 Ct. Cust. Appls., 159; T. D. 31677); *Gage Bros. & Co. v. United States* (2 Ct. Cust. Appls., 427; T. D. 32174); *Frank v. United States* (2 Ct. Cust. Appls., 85; T. D. 31633); *United States v. Park* (3 Ct. Cust. Appls., 352; T. D. 32907).

If we assume that the merchandise is neither porcelain nor any other of the articles provided for in paragraph 94, or that, if one of

the articles therein named, it is not in the meaning of the statute susceptible of decoration or ornamentation, it still remains to be ascertained, and for the importer to show affirmatively, that these tubes are composed wholly or in chief value of earthy or mineral substances not specially provided for elsewhere than in paragraph 95. But importer's evidence is that he does not know of what these tubes are made, and we are unable to see why the board or this court should be asked to assume to possess greater knowledge on this subject than the witness. The term "Marquardt-Masse" is not in common use. We do not know, nor, as stated, are we referred to any writing or authority that sheds any light on the question of what it is, of what composed, or how made. A chemical analysis of these tubes and an explanation of the methods employed in their manufacture would undoubtedly afford a sufficient basis for their proper classification. This information the record does not contain. It was the duty of the importer to furnish the same, and hence, as we view the case, we are not justified in classifying the merchandise under paragraph 95 even if it be assumed that the evidence and the law warrant the conclusion that it is not classifiable under paragraph 94.

The judgment of the Board of General Appraisers is *affirmed*.

BROWN & Co. v. UNITED STATES (No. 1359).¹

1. STRAW AND GRASS.

"Straw" and "grass" in popular usage have never been applied to fibers taken from the bark of trees, but even if bast fiber were regarded as vegetable fiber of like kind with ordinary grass and straw, paragraph 463, tariffact of 1909, would not apply. That paragraph is expressly limited to manufactures of grass and straw in their natural form and structure.

2. PROTEST INSUFFICIENT.

However, the protests here confined the collector's attention to paragraph 215; there was nothing in them to notify that official that any reliance was placed on paragraph 463. The protests were insufficient.

United States Court of Customs Appeals, November 18, 1914.

APPEAL from Board of United States General Appraisers, Abstract 34599 (T. D. 34127).

[Affirmed.]

Allan R. Brown for appellants.

Bert Hanson, Assistant Attorney General (Charles E. McNabb, assistant attorney of counsel), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

SMITH, Judge, delivered the opinion of the court:

Several shipments of slippers, classified by the collector of customs at the port of New York as wearing apparel composed in chief value

¹ Reported in T. D. 34936 (27 Treas. Dec., 515).

of cotton, were assessed for duty at 50 per cent ad valorem under the provisions of paragraph 324 of the tariff act of August 5, 1909, which paragraph reads as follows:

324. Clothing, ready-made, and articles of wearing apparel of every description, composed of cotton or other vegetable fiber, or of which cotton or other vegetable fiber is the component material of chief value, made up or manufactured, wholly or in part, by the tailor, seamstress, or manufacturer, and not otherwise provided for in this section, fifty per centum ad valorem.

The classification of 33 of the 57 entries made was protested by the importing company on the ground that the goods covered by them were composed in chief value of bast, dutiable at 35 per cent ad valorem under the provisions of paragraph 215 of the said act, which paragraph reads as follows:

215. House or cabinet furniture wholly or in chief value of wood, wholly or partly finished, and manufactures of wood or bark, or of which wood or bark is the component material of chief value, not specially provided for in this section, thirty-five per centum ad valorem.

To the classification of the remaining 24 entries protest was made on the ground that the articles therein described were manufactures in chief value of grass or straw, dutiable at 35 per cent ad valorem under paragraph 463 of the same act, which paragraph, in so far as material, reads as follows:

463. Manufactures of * * * grass, * * * straw, * * * or of which these substances or any of them is the component material of chief value, not specially provided for in this section, thirty-five per centum ad valorem; but the terms "grass" and "straw" shall be understood to mean these substances in their natural form and structure, and not the separated fiber thereof; * * *.

The board found that all of the slippers were composed in chief value of straw, and accordingly sustained the protests claiming that the goods were manufactures in chief value of straw and overruled those in which it was claimed that the articles imported were manufactures in chief value of bast.

The importer appealed from that part of the board's decision overruling the protests based on paragraph 215, and now contends that those protests were sufficient to call the attention of the collector to the fact that the goods were claimed to be manufactures of straw or grass, which class of goods is provided for in paragraph 463 and in no other paragraph of the act.

The trouble with that contention is that the importer did not claim that the goods covered by the overruled protests were manufactures of straw or grass. The claim of those protests was that the importations to which they referred were manufactures of bast, and bast, as that term is commonly understood, is neither straw nor grass. The term "bast" was originally applied to the fiber obtained from the inner bark of the lime or linden tree. Subsequently the

meaning was apparently extended to cover the strong, woody fiber obtained from the phloem or inner fibrous bark of various trees other than the linden. See Worcester's Dictionary, Webster's International Dictionary, Century Dictionary, Standard Dictionary, and Oxford Dictionary.

The words "straw" and "grass" in popular usage have never been applied to the fibers taken from the bark of trees, and even if bast fiber could be regarded as a vegetable fiber of the same nature and kind as the separated fibers obtained from grass and straw, paragraph 463 would still be inapplicable in terms to bast, for the reason that that paragraph is expressly limited to manufactures of grass and straw in their natural form and structure.

In our opinion the denomination of the slippers as manufactures in chief value of bast conveyed not the shadow of a hint that they were made of straw or grass and led the collector to the belief that they were claimed by the protests to be manufactured of woody fiber—a belief which must have been strengthened by the allegation that the goods were dutiable under paragraph 215, which provides for manufactures of wood or bark or of which wood or bark is the component material of chief value.

The classification of the goods, the rate of duty, and the paragraph specified by protestants confined the attention of the collector to paragraph 215, and certainly there was nothing in any of the protests which would cause the collector to suspect that the importers did not rely on paragraph 215, but on paragraph 463, which was not mentioned at all. If the importers had paragraph 463 in mind at the time they made objection to the collector's classification, their protests not only fail to show that fact, but affirmatively establish that the collector was misled and misdirected as to the real ground of their complaint.

We think the protests involved in this appeal were wholly insufficient and that therefore they were properly overruled by the board.

The decision of the Board of General Appraisers is *affirmed*.

UNITED STATES *v.* AMERICAN SMELTING & REFINING CO. (No. 1365).¹

COPPER MATTE, REGULUS OF COPPER.

The merchandise is produced by smelting metalliferous rock containing sulphides of lead, copper, and iron. It was stipulated that the importations were mattes and that "matte" and "regulus" are interchangeable terms. Now the uncontradicted testimony shows that mattes containing the percentages of copper, lead, iron, and sulphur found in these importations were known to the wholesale trade before and after the passage of tariff act of 1909 as copper mattes. They must be accepted to be copper mattes, and as such being regulus of copper they were entitled to free entry.

¹ Reported in T. D. 34937 (27 Treas. Dec., 517).

United States Court of Customs Appeals, November 18, 1914.

APPEAL from Board of United States General Appraisers, Abstract 35013 (T. D. 34279).

[Affirmed.]

Bert Hanson, Assistant Attorney General (*Thomas J. Doherty*, special attorney, of counsel), for the United States.

Gerry & Wakefield for appellee.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

SMITH, Judge, delivered the opinion of the court:

Certain merchandise designated in the invoice as copper matte and classified by the collector of customs at Perth Amboy, N. J., as lead-bearing ore was assessed for duty at 1½ cents per pound under the provisions of paragraph 181 of the tariff act of 1909, which paragraph, in so far as pertinent, reads as follows:

181. Lead bearing ore of all kinds, one and one-half cents per pound on the lead contained therein; * * *.

The importer protested that the importation was duty free as copper matte or regulus under the following provision of the free list of said act:

(Free List). That on and after the day following the passage of this act, * * * the articles mentioned in the following paragraphs shall, when imported into the United States * * * be exempt from duty:

* * * * *

544. Copperore; regulus of, and black or coarse copper, and copper cement; * * *.

The Board of General Appraisers sustained the protest and the Government appealed.

The merchandise in question was produced by fusing or smelting ore or metalliferous rock or minerals containing sulphides of lead, copper, and iron. It appears that when ores bearing sulphides of lead, copper, and iron are fused—that is to say, reduced to a melted state—the slag or dross, refuse and scoria separates from the other constituents of the ore and floats at the top. So much of the lead as is freed from sulphur falls to the bottom of the crucible, leaving the fused sulphides of lead, copper, and iron floating between the lighter slag and the heavier lead. While in the melted state the slag, metallic sulphides, and lead may be either tapped at their respective levels and withdrawn, or the lead alone may be drawn off from the bottom of the crucible, leaving the slag and metallic sulphides to solidify in the crucible in their relative positions. In either event, the metallic sulphides, separated from the slag and metallic lead, constitute, according to the testimony, what is known as matte.

On the hearing before the board it was stipulated that the importations covered by the several protests were mattes, and that “matte” and “regulus” are interchangeable terms having the same meaning.

From the analyses submitted to the board and admitted to be correct it appears that the different mattes covered by the several protests contained the following percentages of metal and sulphur:

- Protest No. 713217: Lead, 38.30; copper, 38.35; iron, 0.3; sulphur, 13.35.
- Protest No. 713218: Lead, 17.20; copper, 18.40; iron, 28.00; sulphur, 20.80.
- Protest No. 713219: Lead, 17.80; copper, 18.59; iron, 25.6; sulphur, 16.57.
- Protest No. 724769: Lead, 23.50; copper, 48.3; iron, 5.9; sulphur, 15.10.
- Protest No. 724770: Lead, 38.80; copper, 38.57; iron, 0.5; sulphur, 13.0.
- Protest No. 724772: Lead, 18.80; copper, 17.91; iron, 28.07; sulphur, 17.40.

The admitted facts leave only one question to be determined, and that is whether the goods may be properly considered as *copper* mattes. If they are copper mattes, then under the stipulation that regulus is a matte, the merchandise was clearly admissible free of duty as regulus of copper.

Heinrich O. Hofman, a witness for the importer, testified that in mattes of the composition established by the analyses the value of the copper largely predominated, and that such mattes would be sent to the copper department of the reduction works for treatment. This testimony was corroborated by importer's witness Ledoux, who stated that he had sold hundreds of thousands of tons of mattes, and that mattes containing 38 per cent lead, 38 per cent copper, 13 per cent sulphur, and a small percentage of iron would be purchased on the basis of the copper value only. Colcord, a practical metallurgist and assistant superintendent for 15 years of smelting and refining plants, testified for the importer that copper was worth four times as much as lead, and that in smelters with which he was connected no attempt at all was made to recover the lead found in such mattes as those imported. According to this witness, the percentage of lead found in the goods imported was a detriment to the mattes and reduced their value.

The Government witnesses agreed with those of the importer that mattes of the kind in controversy were purchased for the copper which they contained and that any lead recovered from them would be a secondary matter. Indeed, Willet S. Morse, one of the Government witnesses, testified that the recovery of the lead contained in mattes such as those in question was a recent development in smelting and refining operations and that it had not yet passed the experimental stage.

From the testimony on both sides of the case it would seem, therefore, that the mattes under consideration are valuable chiefly, if not exclusively, for the copper they contain, and that if they are to be differentiated in any way from mattes in general they should be designated as copper mattes.

But, however that may be, it is established by the uncontradicted testimony of Ledoux and Colcord that mattes containing the per-

centages of copper, lead, iron, and sulphur found in the importation were known to the wholesale trade of the country and designated by it at and prior to the passage of the tariff act of 1909 as copper mattes. To the same effect was the testimony of Willet S. Morse, executive officer of the Perth Amboy branch of the American Smelting & Refining Co. and a Government witness, who stated that the goods imported were copper mattes containing lead.

In our opinion the goods involved in this appeal are copper mattes and are entitled to free entry as regulus of copper, inasmuch as the terms "copper mattes" and "regulus of copper" have admittedly come to mean the same thing.

The decision of the Board of General Appraisers is therefore *affirmed*.

UNITED STATES *v.* BURLEY & TYRRELL Co. (No. 1369).¹

1. BOARD'S FINDING ON JUDICIAL NOTICE TAKEN.

The question at issue was whether the stem or the bowl of the imported glassware constitutes value in chief of the merchandise. The relative values were not shown by the testimony. Evidence taken on the hearing of other protests and regarded as material must be offered and received in conformity with established rules and after opportunity has been afforded counsel to reexamine or cross-examine witnesses.

2. *IBID.*

And as there was no proof actually before the board upon which a conclusion could be rested that molded and not blown glass was the component material of chief value, the knowledge of the board itself could not support its conclusion.

United States Court of Customs Appeals, November 18, 1914.

APPEAL from Board of United States General Appraisers, Abstract 35264 (T. D. 34321).

[Reversed.]

Bert Hanson, Assistant Attorney General (*Leland N. Wood*, special attorney, of counsel), for the United States.

Curie, Smith & Maxwell (*Thomas M. Lane* of counsel) for appellee.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

SMITH, Judge, delivered the opinion of the court:

Certain glassware imported at the port of Chicago was classified by the collector of customs as composed in chief value of blown glass and assessed for duty at 60 per cent ad valorem under the provisions of paragraph 98 of the tariff act of 1909, which, in so far as pertinent, reads as follows:

98. Glass bottles, * * * and all articles of every description, including bottles and bottle glassware, composed wholly or in chief value of glass blown either in a mold or otherwise, * * * sixty per centum ad valorem; * * *.

¹ Reported in T. D. 34938 (27 Treas. Dec., 520).

The importer protested that the goods in question were not composed in chief value of blown glass and claimed that the merchandise should have been assessed for duty at 45 per cent ad valorem as manufactures of glass under paragraph 109 of said act which, in so far as applicable, reads as follows:

109. * * * All glass or *manufactures of glass* or paste, or of which glass or paste is the component material of chief value, not specially provided for in this section, forty-five per centum ad valorem.

The Board of General Appraisers found that the importation was not composed wholly or in chief value of glass blown either in the mold or otherwise and sustained the protest of the importer. The Government appealed, and now contends that the decision of the board should be reversed on the ground that the evidence adduced at the hearing was insufficient to justify the conclusion that the merchandise in question was not in chief value of blown glassware, as found by the collector.

As we read the record, the evidence shows that ~~the~~ bowl of the glassware is blown by an apprentice. The stem and foot are then molded by skilled workmen, either from the hot glass drawn from the bottom of the bowl or from separate pieces of hot glass which are subsequently attached.

From the fact that the bowl is blown by an apprentice and that the stem and foot are shaped by a skilled artisan it might be inferred that the cost of the labor of blowing the bowl was less than the cost of the labor of molding the stem and the foot, but from those relative values, standing alone, it can not be deduced that the stem and foot were the components in chief value of the goods imported. In determining the constituent of chief value entering into the composition of any article of merchandise not only the value of the labor employed in making such constituent but also the value of the material used in its manufacture, must be taken into account. To overcome the classification of the collector and to rebut the presumption of correctness attaching to his decision, it was therefore incumbent on the importer to show not only the value of the labor employed in making the blown glass and the molded glass, but also the value of the material actually employed in the blown and in the molded components of the merchandise.

According to the testimony, the bowls of some stem glassware contains more glass than that found in the stem and foot. In others, however, more glass is found in the stem and foot than is found in the bowl. To which particular class the importation belongs was not shown by the evidence, and we are left without information as to the relative quantities of glass used in making the bowls and the stems and feet of the glassware imported. Witness Coleman did

testify that "the cost of the article chiefly is in the making of this foot and this stem," but whether he meant by that the cost of the labor alone or the cost of both labor and material is not at all clear. Inasmuch as the witness, however, in the testimony which preceded the statement just referred to, confined himself to the value of the labor and failed to specify which component of the importation contained the greater quantity of glass, we incline to the opinion that he was testifying to the relative values of the labor and not to the relative values of the labor and material. In this view we are confirmed by the finding of the board that the relative values of the blown and molded glass were not shown and by the fact that the decision appealed from seems to have been based not on the testimony but on the knowledge of the board that blown glass was not chief value. Whether that knowledge was derived from the trial of similar protests in other cases or from long experience in dealing with stem glassware does not appear. But, whether derived from one source or the other, such knowledge was not competent evidence which could be legally made the basis of the board's decision, and it therefore must be disregarded on appeal. Evidence taken on the hearing of other protests and regarded by the board as material to the determination of a pending controversy must, before it can be considered by the board, be offered and received in evidence in conformity with the rules in such cases made and provided and after an opportunity has been afforded to counsel to reexamine or cross-examine the witnesses. Rule 34, Board of General Appraisers; *United States v. Oberle* (1 Ct. Cust. Appls., 527, 528; T. D. 31545); *United States v. Lun Chong & Co.* (3 Ct. Cust. Appls., 468, 469; T. D. 33041).

In this case the component material of chief value was not a matter of which the board could take judicial notice, and the board's expert knowledge of the merchandise, if it had any, could not of course be utilized by it in reaching a decision. To hold otherwise would deprive the protestants of the right of cross-examination of adverse witnesses and would effectually block the review by this court of the facts on which the decision was based.

As, in this case, the knowledge of the board, whether derived from its own experience or from testimony adduced at other hearings, can not be considered as evidence, and as there was no evidence showing the relative values of the constituent parts of the merchandise, we think the board had nothing before it upon which it could safely or legally rest the conclusion that molded and not blown glass was the component material of chief value.

The decision of the Board of General Appraisers must therefore be *reversed*.

UNITED STATES *v.* JOHNS-MANVILLE CO. (No. 1376). UNITED STATES
v. ARMSTRONG CORK CO. (No. 1377).¹

CLIPPINGS OR SHAVINGS OF CORK BARK.

It is immaterial whether the clippings or shavings of cork bark here be deemed waste or not. A review of the legislation affecting the subject matter, of the practice at the customs, and of pertinent judicial decisions makes it clear these cork clippings and shavings were meant to be, and were, included within the provisions of paragraph 547, tariff act of 1909, and so were entitled to free entry.

United States Court of Customs Appeals, November 18, 1914.

APPEAL from Board of United States General Appraisers, G. A. 7541 (T. D. 34276).

[Affirmed.]

Bert Hanson, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, of counsel), for the United States.

Allan R. Brown for appellees.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

DE VRIES, Judge, delivered the opinion of the court:

These appeals concern importations at the port of New York of a variety of merchandise, which has been appropriately divided into three general classes:

1. Large pieces or sheets of the bark of the cork tree of inferior quality, either the first, or what is known as "virgin" bark, or later growths which are inferior in grain, and all of which are used to be ground into materials for cork carpets or linoleums and the manufacture of cork articles.

2. Small pieces or chunks of cork bark which have either been broken in handling through accident or have resulted from the trimming of sheets of the same.

3. Various small pieces, clippings or shavings of cork bark or cork sheets and squares, fragments, from which corks or cork disks or other manufactured cork articles have been cut, all constituting the residuum arising from the manufacture of various cork articles.

The several classes were indiscriminately mixed in the same bales as imported, and while there has been no serious contention upon the part of the Government that classes 1 and 2 are dutiable, the entire importation was rated for duty as mixed goods, part dutiable and part nondutiable according to the established rule. *United States v. Ranlett & Stone* (172 U. S., 133-147); *United States v. Waterhouse* (1 Ct. Cust. Appls., 353-359; T. D. 31452); *United States v. Strauss & Co.* (3 Ct. Cust. Appls., 180-182; T. D. 32464, 3 Ct. Cust. Appls., 325-327; T. D. 32621).

Under that well-settled rule the entire importation was assessed as waste not specially provided for under the provisions of paragraph 479 of the tariff act of 1909. The importers protested, claiming

¹ Reported in T. D. 34939 (27 Treas. Dec., 523).

the entire importation entitled to free entry under the provisions of paragraph 547 of the act as "cork wood, or cork bark, unmanufactured."

Counsel for the Government has devoted able argument to the point that the merchandise described as class 3 is cork waste resulting from the manufacture of cork blocks or squares and various cork articles, and as such dutiable. In our view of the case the competing provisions of the tariff law render the question of whether or not the merchandise is waste unimportant and unnecessary of decision. It may be assumed, in our view, that the merchandise is cork waste. The controlling question in the case is, Are the provisions of paragraph 547 of the free list sufficiently broad to include this merchandise? If so, obviously, whether or not cork waste, it is more specifically provided for therein than as waste under paragraph 479 and entitled to free entry.

The determinative issue in the case, therefore, is, Is the merchandise described in our classification 3 within the scope and intent of paragraph 547 of the free list? Concededly if that merchandise is so included, those classes described in 1 and 2 are likewise included. It will be helpful to have before us and bear in mind the exact method of the growth and production of the importations and their uses. A concise exposition of these facts is set forth in *King et al. v. Smith* (14 Fed. Cas., 551-552, Case 7806), as follows:

The following facts appeared by the testimony: The cork tree is a species of oak, growing in forests in Spain, Portugal, and the south of France. There is an inner bark through which exudes a gummy substance, which, in the course of every seven years, forms a second bark, completely covering the inner one. This second bark is the corkwood of commerce. Outside of it there forms a thin, but hard and fibrous, covering, which is useless. The cork crop is harvested by stripping the trees, at the maturity of the second bark, of that bark, leaving the inner bark untouched. The outside of the cork, as it comes off, is covered with the fibrous covering called the "back." The inner surface is rough and discolored and is called the "belly." The cork comes off in long strips, curved from side to side, with irregular ends and edges, formed by the strokes of the ax and by fracture of the material as it is pried off. In this condition it is not fit for use nor for sale and is not exported. It is first boiled or steamed to soften it, then flattened under pressure, and the back partially scraped off and the edges trimmed off with knives. The slabs thus flattened, trimmed, and scraped are then packed in bales and bundles and exported in that shape as raw material. When again steamed and softened and the remains of the back scraped off these slabs may be cut up and made into floats, soles, life preservers, inkstands, artificial limbs, and the like. The trimmings from the edges may be made into cork stoppers and, as a step in the process, may be cut into smaller blocks, called "squares" or "quarters." Cork stoppers are made either from these cork squares or quarters by hand or machinery. Cork stoppers are also made by cutting the flat slabs into long strips of suitable size, from which the finished corks may be cut by a blow from a perpendicular punch or by a machine like a turning lathe; or the strips may again be reduced to squares or quarters, which latter are made into stoppers by hand or (in this country) by machinery.

In this ascertainment it will also be of value to have before us and contrast the entire congressional language upon the subject matter as elucidative of the differentiations of this merchandise and parts thereof in the mind of Congress at enactment. This legislation is particularly instructive because it discloses a complete scheme of duties and grants of free entry as to this subject matter with precisely drawn lines of differentiation. The paragraphs contrasted are:

429. Cork bark cut into squares, cubes, or quarters, eight cents per pound; manufactured corks over three-fourths of an inch in diameter, measured at larger end, fifteen cents per pound; three-fourths of an inch and less in diameter, measured at larger end, twenty-five cents per pound; cork, artificial, or cork substitutes, manufactured from cork waste or granulated cork, and not otherwise provided for in this section, six cents per pound; manufactures, wholly or in chief value of cork, or of cork bark, or of artificial cork or cork substitutes, granulated or ground cork, not specially provided for in this section, thirty per centum ad valorem.

547. Cork wood, or cork bark, unmanufactured.

Thus while literally the lexicographic authorities agree that "cork" and "cork bark" are used interchangeably, which agreement is further confirmed by the understanding of trade and commerce, as shown by this record, this legislative scheme plainly shows that Congress had them in mind and specifically mentioned them as different tariff entities.

Upon reading the two paragraphs together the congressional purpose is unmistakable. There is an elaborate and detailed effort to precisely name all classes of this merchandise rated for duty and to prescribe the appropriate rate thereupon according to that description and its exact condition of manufacture or advancement in manufacture. There is an equally evident purpose to give free entry for the materials for these manufactures. Thus Congress had in mind and made dutiable with great exactness and marked differentiation, in accordance with the constructive processes applied thereto, "cork bark" in squares, cubes, or quarters, "manufactured corks" according to size, "artificial cork" and "cork substitutes," "cork waste," and "granulated cork," "manufactures" in chief value of "cork" or "cork bark," and "granulated or ground cork." Plainly, in this nomenclature Congress treated "cork" as something different but made from cork bark. It uses the word solely with reference and applicable to things constructed from cork bark. It uses the words "cork bark" as expressive of a material out of which cork squares, cork, granulated cork, and other cork articles are made. The paragraph shows Congress had "cork waste" in mind, for it is specifically mentioned. It is mentioned as a material out of which cork articles are made. Yet having it in mind, having mentioned it as a material, Congress did not in this carefully and elaborately drawn scheme making expressly dutiable all cork articles make cork

waste expressly dutiable. Neither is there any general language in the dutiable paragraph which by any construction embraces it. The natural inference, therefore, is, Congress having cork waste expressly in mind, not having made it dutiable in this exhaustive scheme of legislation and having expressly named it therein as a material only, had it in mind as a raw material and intended to relegate it to the raw material or free-list provision as "cork wood, or cork bark, unmanufactured."

That being the apparent intent of Congress, is the language employed sufficient for that purpose? We think it is. The legislative concept assigns to this paragraph that scope which will include all cork materials out of which the advanced cork manufactures and articles mentioned in paragraph 429 are made. The construction, therefore, which effectuates that purpose without violence to its language should be adopted. The words "cork wood" and "cork bark" are not necessarily interchangeable. Both being used in the paragraph the legal inference is that they are not. Cork wood refers more to the substance, while cork bark naturally refers to a form of that substance at one stage of its existence. Thus the bark as it comes from the tree would be cork bark in that form, but it is composed of a woody substance or composition known as cork wood. When the bark is made into a bottle cork it ceases, of course, to be cork bark, but remains cork wood in the tariff sense as descriptive of the substance or wood out of which the cork is made. This view of the natural significance of the terms not only gives a distinct meaning to all the words of the statute but also makes the term "cork wood" descriptive and inclusive of cork waste because all cork waste is of the woody substance known as cork wood. This generic scope given the meaning of "cork wood" explains why it is not used in paragraph 429 coextensively and interchangeably with cork bark. It naturally includes all the articles more specifically provided for in paragraph 429, and it therefore appropriately occurs only in the general residuum provision, thereby completing this inclusive code of law upon cork materials and articles.

Nor is this view at variance with a consistent line of decisions by this court. The merchandise chiefly questioned is the residuum of cork squares and plates, dutiable under paragraph 429, left after corks and disks have been cut therefrom. While these squares and disks were dutiable articles as such, after the corks and disks were cut away, the residuum ceased to be such, for it ceased to be "cork bark cut into squares, cubes, or quarters." Nor was it dutiable under that paragraph as "manufactures * * * of cork bark," for the reason that it in no wise responds to the call and definition of a manufacture. It is merely the residuum of a consumed manu-

facture. It has no name, it is not by the processes applied thereto fitted for a purpose or been put upon the course of manufacture toward any particular purpose, is fit only to be remanufactured into some article other than that which it was originally designed to be made into, and has no value, condition or processing, which makes it useful or usable other than as the raw material from which it originated. It is a cork wood or substance.

The competing statutes and the merchandise are essentially the same in principle as with the fur clippings in *United States v. Hatters' Fur Exchange* (1 Ct. Cust. Appls., 198; T. D. 31237), held by this court to be dutiable as "furs, undressed"; and the reclaimed rubber in *United States v. Michelin Tire Co.* (1 Ct. Cust. Appls., 518; T. D. 31544), held dutiable by this court as "india rubber, crude, fit only for remanufacture"; and the undressed raw jute rejected by carding machines held by this court to be "jute, unmanufactured," in *Salomon Bros. & Co. et al.* (2 Ct. Cust. Appls., 431; T. D. 32196); and the tobacco scrap consisting of cigar clippings and pieces broken from the tobacco where cigars were manufactured held by the Supreme Court of the United States in *Seeberger v. Castro* (153 U. S., 32) to be dutiable as unmanufactured tobacco.

Other considerations aside, the record presents a case peculiarly well within the rule of long continued customs practice. The tariff acts of May 22, 1824, and July 30, 1846, had provided *eo nomine* duties upon "corks." In the tariff act of June 30, 1864, this provision first made its appearance. The *eo nomine* provision for "corks" was dropped and the competitive provisions inserted: "On cork, bark or wood, unmanufactured," 30 per cent ad valorem; "on corks, and cork bark, manufactured," 50 per cent ad valorem. By the tariff act of July 14, 1870, the latter provision was repealed by the enactment of a provision in the free list in the very words of the free-list provision here in controversy, to wit, "cork wood, or cork bark, unmanufactured." The case of *King et al. v. Smith*, *supra*, arose under and concerned this provision of the free list of the tariff act of 1870. Cork squares and cork quarters were assessed for duty. The importers claimed free entry for them as cork, unmanufactured. The report of the decision notes "the plaintiffs relied on the practical construction put on the tariff of 1864 by the Government," and the court instructed the jury that the legal presumption was that Congress intended to include the same goods by these phraseologies and that if they found the practice under that act included these goods within that free-list provision they should find for the plaintiff. The jury so found. The decision leaves a strong inference that the customs practice from 1864 to 1871 was to admit even cork squares and quarters free of duty as cork wood, or cork bark, un-

manufactured. In the tariff act of 1872 Congress reenacted the dutiable provision in the language "on corks and cork bark, manufactured," 30 per cent ad valorem, made no change in the judicially interpreted free provision, but continued the same in force. The tariff act of March 3, 1883, reenacted each of the provisions save as to rates in identical words. The free-list provision was reenacted in the same words in paragraph 548 of the tariff act of 1890, paragraph 457 of the tariff act of 1894, paragraph 536 of the tariff act of 1897, and paragraph 547 of the tariff act of 1909. By paragraph 434 of the tariff act of 1890 Congress, evidently in response to the decision in *King et al. v. Smith*, *supra*, put "cork bark, cut into squares or cubes" on the dutiable list and provided for "manufactured corks," reenacting at the same time, as stated, the free provision. Under this act certain "clippings or shavings left in the process of manufacturing articles from cork bark, but these shavings are not themselves manufactured into anything," were held by the Board of General Appraisers (G. A. 1545; T. D. 12994) not dutiable as waste, but free as "cork wood or cork bark, unmanufactured."

The Government took no appeal, and it appears from the record that that practice has continued and was the settled practice at the time of the enactment of the tariff act of 1909, under which this case arose. Paragraph 319 of the tariff act of 1894 provided only for "corks, wholly or partially manufactured." By the tariff act of 1897, Congress having in mind the broad scope of the decisions in the case of *King et al. v. Smith* and presumptively G. A. 1545 and the long continued customs practice, reenacted this free-list provision, and expressly excepted therefrom by paragraph 416 cork bark cut into squares or cubes, manufactured corks, and artificial cork and cork substitutes manufactured from "cork waste"—seemingly a plainly implied legislative approval of the classification of these cork clippings. No further controversy seems to have arisen, and in 1909 Congress further having expressly described or named by paragraph 429, *supra*, the dutiable cork articles, reenacted this identical free-list provision, so construed. So that it satisfactorily appears, *prima facie* at least, that, from 1864, substantially, and from 1870, exactly, this provision of the free list of the several enacted tariff laws to and until the enactment of the tariff act of 1909, under which this controversy arose, there was a consistent departmental, judicial, and legislative interpretation of this provision as including the identical merchandise here in suit—cork clippings and shavings.

When it appears that for all time until this case arose this merchandise was admitted free of duty under a consistent and continued customs practice approved by the courts and Congress, and which, when changed by a departmental ruling, was almost immediately

expressly approved and enacted as law by Congress (tariff act of 1913, paragraph 464, providing free entry for "cork wood, or cork bark, unmanufactured, and cork waste, shavings, and cork refuse of all kinds)," it would certainly be a severe hardship indeed to visit upon these importers the payment of the duties here involved.

Affirmed.

UNITED STATES *v.* DURBROW & HEARNE MANUFACTURING CO.
(No. 1379).¹

NICKEL-PLATED CAST-IRON ECCENTRICS.

These eccentrics for sewing machines were made of cast iron, drilled, reamed, and nickel plated. Paragraph 147, tariff act of 1909, is limited to castings made wholly of iron. These goods, composed of cast iron and nickel, are strictly within the terms of paragraph 199, where a duty of 45 per cent ad valorem is laid on articles or wares partly or wholly manufactured not specially provided for and composed wholly or in part of metal.

United States Court of Customs Appeals, November 18, 1914.

APPEAL from Board of United States General Appraisers, Abstract 35048 (T. D. 34279).

[Reversed.]

Bert Hanson, Assistant Attorney General (*Martin T. Baldwin*, special attorney, on the brief), for the United States.

B. A. Levett for appellee.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

SMITH, Judge, delivered the opinion of the court:

Eccentrics for the Star sewing machine imported into the country from Germany by parcels post were classified by the collector of customs at the port of New York as manufactures of metal and assessed for duty at 45 per cent ad valorem under the provisions of paragraph 199 of the tariff act of 1909, which paragraph is as follows:

199. Articles or wares not specially provided for in this section, composed wholly or in part of iron, steel, lead, copper, nickel, pewter, zinc, gold, silver, platinum, aluminum, or other metal, and whether partly or wholly manufactured, forty-five per centum ad valorem.

The importer protested that the goods so classified and assessed were not manufactures of metal, but were in fact finished iron castings, dutiable at 1 cent per pound under the provisions of paragraph 147 of said act, which paragraph is as follows:

147. Cast-iron andirons, plates, stove plates, sadirons, tailor's irons, hatter's irons, and castings and vessels wholly of cast iron, eight-tenths of one cent per pound. All castings of iron or cast-iron plates which have been chiseled, drilled, machined, or otherwise advanced in condition by processes or operations subsequent to the

¹ Reported in T. D. 34940 (27 Treas. Dec., 529).

casting process but not made up into articles, shall pay two-tenths of one cent per pound more than the rate imposed upon the castings of iron and cast-iron plates hereinbefore provided for.

The Board of General Appraisers sustained the protest, and the Government appealed.

The merchandise was returned by the appraiser as "cast-iron nickled and steel-nickled finished parts of sewing machines." At the hearing before the board the evidence established that the articles in question were eccentrics for the Star sewing machine, and that such eccentrics were made of cast iron, drilled, reamed, and nickel-plated.

We are of the opinion that the operation of paragraph 147 is limited to castings *made wholly of cast iron*, and that the terms of the paragraph are not broad enough to cover articles which are made of cast iron and some other metal. This view we think is fully supported by the circumstances which led to the passage of paragraph 147 and to the change which that paragraph accomplished in the laws which preceded it. In the tariff acts of 1883, 1890, 1894, and 1897, castings made of iron were either provided for by name or were covered by the general designation "castings of iron." There was, however, no specific enumeration of castings of iron or cast-iron plates advanced in condition by processes or operations subsequent to casting, and, by reason of that fact, the board and the courts uniformly held that castings of iron and cast-iron plates advanced in condition by machining, polishing, drilling, cutting, planing, boring, and like operations were not dutiable as castings, but as manufactures of metal at 45 per cent ad valorem. *T. D. 24604*, *T. D. 26478*, *T. D. 28276*, *Lehigh Manufacturing Co. v. United States* (153 Fed., 596), *Bromley v. United States* (156 Fed., 958), *Prosser v. United States* (1 Ct. Cust. Appls., 29, 30; *T. D. 30856*).

Paragraph 147 of the tariff act of 1909 changed the provision covering iron castings in prior acts, first, by adding to the enumeration castings of iron and cast-iron plates advanced in condition; second, by imposing upon such advanced castings an additional duty of two-tenths of 1 cent per pound; and, third, by providing that castings of iron, cast-iron plates, and other specifically enumerated articles should be wholly of cast iron. That amendment, in the light of the law in force and the decisions rendered at the time of its passage, removed castings of iron and cast-iron plates advanced from the category of "manufactures of metal," gave them the status of castings of iron with a duty slightly greater than that imposed on ordinary castings, and limited the operation of the paragraph to manufactures which were composed wholly of cast iron.

True, the limitation "wholly of cast iron" was placed in the first clause of the paragraph and not in the second, but as that limitation

affected castings of iron and cast-iron plates in general, and as castings of iron and cast-iron plates advanced in condition were, under the amendment, none the less castings of iron and cast-iron plates, the words "wholly of cast iron" became as much applicable to the enumeration of the second clause as to the enumeration of the first. Even if the words "wholly of cast iron" had been entirely omitted from the paragraph, we incline to the belief that the designation, "all castings of iron or cast-iron plates which have been chiseled, drilled, machined, or otherwise advanced in condition by processes or operations subsequent to the casting process," covered at best only such castings as were improved after casting by the expenditure of labor, and not those which were presumably bettered by the addition of material other than cast iron. But however that may be, Congress, in our opinion, especially confined the operation of the paragraph under consideration to manufactures wholly of cast iron, and from that it follows that goods made up of cast iron and some other metal are not dutiable as castings of iron advanced in condition.

The goods involved in this appeal were undoubtedly originally wholly of cast iron, but subsequent to the casting they were plated with nickel, and must therefore be considered as manufactures composed of cast iron and nickel. Consequently they are not covered by paragraph 147 and are strictly within the terms of paragraph 199, which lays a duty of 45 per cent ad valorem on articles or wares partly or wholly manufactured, not specially provided for and composed wholly or in part of metal.

The decision of the board seems to have been based on the decision of this court in the case of *United States v. Leigh & Butler* (4 Ct. Cust. Appls., 304; T. D. 33517). That case, as we see it, is not applicable to the facts of this case, for the reason that the merchandise there involved was composed wholly of iron and not of iron and nickel.

The decision of the Board of General Appraisers is *reversed*.

ALTMAN & Co. v. UNITED STATES (No. 1384).¹

1. PRACTICE.

At the trial importers' counsel stated that as to certain protests no samples of the gloves covered by them could be had, and they were abandoned. Subsequently, however, by stipulation these protests were reopened, and it was agreed the rate on the goods in question should be determined by the rule laid down in the *Wertheimer* case. This became an agreed statement of facts, and the rule in the *Wertheimer* case should have been applied—*United States v. Wertheimer* (4 Ct. Cust. Appls., 338; T. D. 33528).

¹ Reported in T. D. 34941 (27 Treas. Dec., 531).

2. LEATHER GLOVES, HAND EMBROIDERED.

The second class of gloves bore three-point embroideries that were hand stitched. Each of the three points was stitched by the use of only two separate threads, but in each point the two threads are continued so as to form three or four rows or lines. As to these, *United States v. Wertheimer* (4 Ct. Cust. Appls., 338; T. D. 33528) rules, and the doctrine of *stare decisis* applies.

United States Court of Customs Appeals, November 18, 1914.

APPEAL from Board of United States General Appraisers, Abstract 34943 (T. D. 34247).

[Reversed.]

Allan R. Brown for appellants.

Bert Hanson, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, of counsel), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MARTIN, Judge, delivered the opinion of the court:

The merchandise now upon appeal consists of embroidered leather gloves which were imported under the tariff act of 1909.

The collector assessed the importations with appropriate primary duty, and in addition thereto assessed a cumulative duty of 40 cents per dozen pairs under the last clause of paragraph 459 of the act.

The importers protested against the cumulative duty, and their protest was submitted upon evidence to the Board of General Appraisers. Upon consideration the board overruled the protest and the importers now prosecute their appeal.

The following is a copy of the pertinent parts of paragraph 459:

459. In addition to the foregoing rates there shall be paid the following cumulative duties: * * * on all gloves stitched or embroidered, with more than three single strands or cords, forty cents per dozen pairs.

The present issue, therefore, is whether the imported gloves are stitched or embroidered with more than three single strands or cords, within the meaning of the cumulative provision just above copied.

The gloves in question are of two classes. The first class consists of certain items marked "C" upon the invoices, covered by protest No. 674320. It appears from the record that at the trial before the board the importers' counsel made the following statement relative to this protest:

Mr. BROWN. Here I notice protests 666619 and 674320. We could obtain no samples nor identify the embroidery; those are abandoned.

There was no testimony offered at the trial relative to the protests thus abandoned. Afterwards, however, the following written stipulation, signed by counsel for both Government and importers, was filed with the board and made part of the record:

In the matter of protests * * * 674320 * * * of B. Altman & Co.
Stipulations:

It is hereby stipulated and agreed between counsel for the importers and counsel for the United States that the above-entitled protests may be reopened for the purpose of filing this stipulation.

It is further stipulated and agreed that the items marked "C" on the left-hand margin of the invoices in the above-entitled protests cover Paris point gloves of the kind passed upon in the Wertheimer case (T. D. 33528).

It is further stipulated and agreed that the protests may be submitted after filing this stipulation.

After the filing of this stipulation the board entered its decision in the case, sustaining protest No. 674320 by number in one paragraph of the decision and overruling the same protest by number as abandoned in a later paragraph of the decision. This confusion doubtless resulted from clerical error in the drafting of the decision. The board later entered an amendment of the decision, whereby it struck out the part sustaining protest 674320 and retained the part which overruled the same as abandoned.

This ruling of the board was clearly erroneous. The abandonment of protest No. 674320 was opened up by the filing of the written stipulation above copied, and the facts therein conceded became an agreed statement of facts in the case. In the Wertheimer case, *United States v. Wertheimer* (4 Ct. Cust. Appls., 338; T. D. 33528, this court had held that the Paris point gloves in question were not subject to cumulative duty under paragraph 459 of the tariff act of 1909 as gloves stitched or embroidered with more than three single strands or cords. Inasmuch as the stipulation recited that the gloves marked "C" in protest No. 674320 were of the same kind as those passed on in the Wertheimer case, it became the right of the importers to have their protest sustained as to those items.

The second class of goods involved in the present appeal consists of certain leather gloves bearing three-point embroideries which were stitched by hand alone. Each of the three points was stitched by the use of only two separate threads, but in each point the two threads are continued so as to form three or four rows or lines.

It is contended by the Government that in case of hand-stitched gloves like these the proper method of counting the threads is to take the aggregate of all which compose the three points upon a single glove, and not those only which compose a single point upon a glove. According to this rule the gloves now in question would be classified as gloves stitched with more than three single strands or cords and be subject to the cumulative duty, whereas if the threads in a single point only be taken as determinative the opposite result would follow.

The provision for a cumulative duty upon embroidered leather gloves which appears in paragraph 459, *supra*, was incorporated in substantially similar terms in the tariff acts of 1890 and 1897, and it became the subject of much litigation. See *United States v. Spielmann* (1 Ct. Cust. Appls., 279; T. D. 31320), *United States v. Perkins* (1 Ct. Cust. Appls., 323; T. D. 31430), *Carson v. United States* (2 Ct. Cust. Appls., 105; T. D. 31656), *United States v. Wertheimer & Co.*

(2 Ct. Cust. Appls., 454; T. D. 32204), *United States v. Germain* (3 Ct. Cust. Appls., 321; T. D. 32620), *United States v. Wertheimer & Co.* (4 Ct. Cust. Appls., 338; T. D. 33528, and cases cited).

In the *Wertheimer* case (4 Ct. Cust. Appls, 338, 343; T. D. 33528) the following conclusion upon the subject was announced for this court by Judge Smith:

The record shows, without contradiction, that five classes of machines are used in the ornamentation of gloves and that the style of decoration is determined by the particular machine which has been employed in doing the work. For one kind of ornamentation a machine with a single needle and thread and carrying no bobbin or bobbin thread is employed; for another, a machine is used which is equipped with a needle and bobbin and two threads, one for the needle and one for the bobbin. A third variety of ornamentation is accomplished by a machine furnished with two needles and a bobbin and three threads, two for the needles and one for the bobbin, while a fourth and a fifth class of decoration is evolved by machines provided, respectively, with three needles and a bobbin and four needles and a bobbin and the appropriate number of threads.

We think that when Congress laid an additional duty on gloves stitched or embroidered with more than three strands it had in contemplation the methods of manufacture and the machines actually employed by the industry in stitching and embroidering the backs of gloves and that it was the legislative intention that the question of additional duty should be determined by the number of threads really employed in doing the stitching or embroidering rather than by the number of rows or lines of decoration actually stitched. It appears from the testimony that the Paris point gloves here in dispute are ornamented on the back by a machine carrying two needles and a bobbin and employing not more than three threads. They are therefore not stitched with more than three single strands and are not, in our opinion, subject to the additional duty prescribed by paragraph 459. Whether the word "cord" was used in paragraph 459 in the sense of thread or to designate the raised effect produced by creasing and stitching the leather of a glove longitudinally into what is sometimes called a cord we do not pretend to say. If it was used as synonymous with thread, the gloves are not stitched with more than three cords. If it means the raised effect produced by stitching, it is plain from an examination of the exhibit that there are not more than three ribs or corded effects on the back of the glove.

The gloves involved in the foregoing case were ornamented with three points each, and each point was composed of three separate threads, stitched, however, into five lines or rows in every point. The court held that the gloves were to be classified under paragraph 459 in accordance with the number of separate threads composing an individual point. This decision directly negatives the Government's present contention. Nor was the Government's claim overlooked at the trial of the *Wertheimer* case, for it was argued by the counsel in that case and submitted to the court. The decision announced in the case was based upon the view that the style of the stitch employed in each point should determine the character of the embroidery and not the aggregate number of threads found in all of the points upon a given glove. It is true that the gloves now at bar differ from those involved in the *Wertheimer* case in the particular that the present.

articles are hand stitched, whereas the former ones were stitched upon machines. It does not appear, however, that this fact alone should defeat the application of the rule announced in that case, for in either kind of stitching three or more separate threads may be employed in forming a single point, and the improbability that more than three separate threads would ever actually be used for one point in hand stitching should not alter the construction already placed by the court upon the much-disputed provision in question. To the contrary, the present case seems distinctly to invite the application of the rule of *stare decisis*.

The decision of the board is therefore *reversed*.

UNITED STATES *v.* BAUSCH & LOMB OPTICAL Co. (No. 1401).¹

1. ROCK CRYSTAL.

Rock crystal is a colorless or nearly colorless transparent quartz, and quartz is not a carbonate of calcium but a dioxide of silicon.

2. NIKOLS OR NICOL PRISMS.

The importations of nikols or Nicol prisms are manufactured from the mineral substance known as carbonate of calcium, and, as articles or wares of that class are not otherwise provided for, these are dutiable at 35 per cent ad valorem under the provisions of paragraph 95, tariff act of 1909.

United States Court of Customs Appeals, November 18, 1914.

APPEAL from Board of United States General Appraisers, Abstract 35307 (T. D. 34355).

[Affirmed.]

Bert Hanson, Assistant Attorney General (*Leland N. Wood*, special attorney, on the brief), for the United States.

Submitted on record by appellee.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

SMITH, Judge, delivered the opinion of the court:

Imported goods invoiced as spar prisms were classified by the collector of customs at the port of Rochester, N. Y., as articles composed wholly or in chief value of rock crystal and were accordingly assessed for duty at 50 per cent ad valorem under that part of paragraph 112 of the tariff act of 1909 which reads as follows:

112. * * * All articles composed wholly or in chief value of agate, rock crystal, or other semiprecious stones, * * * not specially provided for in this section, fifty per centum ad valorem.

The importer protested that the goods were in fact articles composed wholly or in chief value of earthy or mineral substances, and claimed that they were dutiable at 35 per cent ad valorem under the

¹ Reported in T. D. 34942 (27 Treas. Dec., 535).

provisions of paragraph 95 of the tariff act of 1909, which paragraph reads as follows:

95. Articles and wares composed wholly or in chief value of earthy or mineral substances, not specially provided for in this section, whether susceptible of decoration or not, if not decorated in any manner, thirty-five per centum ad valorem; if decorated, forty-five per centum ad valorem; carbon, not specially provided for in this section, twenty per centum ad valorem; electrodes, brushes, plates, and disks, all the foregoing composed wholly or in chief value of carbon, thirty per centum ad valorem.

The protest was sustained by the Board of General Appraisers.

The merchandise in question is a crystalline substance having the form of an oblique prism or solid, bounded by six quadrilateral planes, four of which constitute the sides and two the ends of the figure. All the side planes are parallel, and the two end planes make an oblique angle with the planes constituting the sides. The appraiser returned the merchandise as spar prisms and certified that the sample in evidence was representative of so-called "nikols" or "glan thompson prisms." It appears from an investigation of the standard authorities that nikols or Nicol prisms are the invention of William Nicol, a Scotch physicist, and are designed to increase the divergence of two rays of light so as to produce a single image. (Encyclopedia Britannica.) To make the Nicol prism, a rhombohedron of Iceland spar is first cut in two along a plane running from the lower line of one end plane to the upper line of the other. The two halves are then joined together by means of Canada balsam. (See Ganot's Physics and Standard Dictionary.) Iceland spar belongs to the calcite group of minerals, and the calcites are carbonates of calcium. (Text book of Mineralogy, Dana, pp. 354-355.) The chemist to whom the merchandise was referred by the board for a report as to whether it was rock crystal, reported in writing that it was "calcium carbonate crystal." Rock crystal is a colorless or nearly colorless transparent quartz, and quartz is not a carbonate of calcium, but a dioxide of silicon. (See Rock Crystal and Quartz; Standard Dictionary; Textbook of Mineralogy, Dana, pp. 324-325.) From this it is apparent that the article imported is not rock crystal, and as it is not contended that it is either agate, which is a kind of quartz or a semiprecious stone, we think it clear that the merchandise should not have been classified for duty under paragraph 112. On the evidence submitted to the board, we find that the nikols or Nicol prisms are manufactured from the mineral substance known as carbonate of calcium, and as articles or wares of that class are not otherwise provided for, we must conclude that the importation was dutiable at 35 per cent ad valorem under the provisions of paragraph 95, as claimed by the importer.

The decision of the Board of General Appraisers is *affirmed*.

UNITED STATES *v.* WOLFF & Co. (No. 1402).¹

1. ELECTRIC BULBS, FRUIT SHAPED AND COLORED.

These electric-light bulbs, colored, and shaped as fruit, could only be doubtfully classified as fruit, and any doubt should be resolved in favor of the importer. To hold otherwise would result in classifying these importations in all their variety at greatly varying rates of duty, and duties should be uniform upon uniform classes and kinds of goods.

2. MANUFACTURES OF METAL.

The goods were assessed by the board as "articles or wares * * * composed wholly or in part of iron, steel, lead, copper, nickel, pewter, zinc, gold, silver, platinum, aluminum, or other metal; * * *" under paragraph 199, tariff act of 1909. This assessment was proper. "Manufactures of metal" refers to the material and includes all the component classes of such by whatever distinctive name known.

United States Court of Customs Appeals, November 18, 1914.

APPEAL from Board of United States General Appraisers, Abstract 35162 (T. D. 34307).

[Affirmed.]

Bert Hanson, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, of counsel), for the United States.

Comstock & Washburn for appellees.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

DE VRIES, Judge, delivered the opinion of the court:

The official sample of the imported merchandise the subject of this appeal is a small electric-light bulb of pear shape and color to be used in Christmas-tree decoration. While the official sample is thus confined, there is stipulated into the record other similar samples, which, however, are of a class of articles now so common in electric lighting and decoration that the court may well take judicial notice of them. It is proven in the record by testimony of the official customs examiner that "this merchandise is made to imitate about twenty-four varieties of fruits and flowers." The illustrative samples as well as common observation and understanding readily extends this category to berries, mushrooms, nuts, acorns, wreaths, automobiles, canoes, baskets of flowers, festoons, horns of plenty, vases, etc.

The crucial question is, Are these articles artificial or imitation fruit within paragraph 438 of the tariff act of 1909?

These importations are but illustrations of the comparatively new industry, approaching an art, of electrical lighting, taking the form of decoration or shading, adjusted and shaped to suit the situation, condition, and desired effects. On every hand this art finds its daily exposition in one form or another to suit the particular effect

¹ Reported in T. D. 34943 (27 Trans. Dec., 537).

sought to be accomplished. It may be for decorating and lighting Christmas trees, wherein harmony of effects as a part of a tree may require the lighting to be representative of fruit or nuts, or it may be in the shading of a room green or rose or other color or some other naturally appropriate effect according to the desired result. In such cases be it noted that in proportion to the other lighting agencies used in the room the colored, frosted, or decorative effect is lost, so that effective service and lighting makes the electric light itself, thus colored or decorated, the primary consideration. Its primary use is that of a lighting agency incidentally frosted, shaded, colored, or decorated, thereby adjusting and conforming the particular lighting scheme and effect desired. Such is equally true of all electrical lighting. So we observe electrical torch effects at the entrance of buildings, electrical flag displays from buildings, electrical baskets, canoes, automobiles, etc., as electrical light table decorations; electrical chariots, horses, bottles, human figures, wearing apparel, as electrical light advertisements, many of which are made beautifully and artistically realistic. These electrical light effects are made up of units of these variously colored or decorated electric-light bulbs, sometimes separately, sometimes collectively, some clear, others frosted, colored, and variously otherwise decorated, as may be appropriate to the particular effect to be produced.

On the other hand, in the same journey we observe stone, wood, and metal figures in the forms of fruit and flower effects, decorative of buildings, furniture, monuments, statues, lawns, etc. If we classify one of these classes of decorative articles as artificial or imitation fruit or flowers all should be so rated for duty.

We do not think it was the intent of Congress to assess duty upon such articles as artificial or imitation fruits and flowers. If that were the purpose of Congress, charged with the making of duties uniform, it would certainly have extended the provisions of paragraph 438 to include at least nuts and mushrooms, all of which representative articles are made, bought, and sold indiscriminately mixed with the artificial pears. Indeed one of the forceful reasons for the court denying that classification is that it would result in classifying these importations at greatly varying rates of duty. That construction of a tariff statute which will render duties uniform upon uniform classes and kinds of goods is greatly to be desired must be assumed to have been the Congressional purpose and should not be denied save for cogent and clearly convincing reasons.

Moreover, an inspection of these samples immediately suggests to the mind an electric-light bulb with lighting as its primary function and intended use. The shape is not uncommon to but of ordinary electric-light bulbs, pear shaped, and there is present in all its practicable and useful completeness the metal base with screw threads

into which is soldered a platinum wire and the other metal structures essential to and as exists in every electric-light bulb. They are electric lights colored as and fruit shaped, complete and ready for use, and as such we think not classifiable as artificial or imitation fruit. To classify them otherwise, at least, must be with many doubtful reservations. This doubt should be resolved in favor of the importer. *Goat and Sheepskin Import Co. et al. v. United States* (5 Ct. Cust. Appls., 178; T. D. 34254), *Woolworth v. United States* (1 Ct. Cust. Appls., 120-122; T. D. 31119), *United States v. Hatters' Fur Exchange* (1 Ct. Cust. Appls., 198-202; T. D. 31237), *United States v. Matagrín* (1 Ct. Cust. Appls., 309-312; T. D. 31406), *United States v. Harper* (2 Ct. Cust. Appls., 101-105; T. D. 31655), *American Express Co. v. United States* (3 Ct. Cust. Appls., 475-479; T. D. 33121), *United States v. American Bead Co.* (3 Ct. Cust. Appls., 509-515; T. D. 33166), *Newhall et al. v. United States* (4 Ct. Cust. Appls., 134; T. D. 33410).

The board found metal to be the chief value of the importations and overruled the collector's assessment, as articles in chief value of blown glass are, under paragraph 98 of the tariff act of 1909, directing assessment as "articles or wares * * * composed wholly or in part of iron, steel, lead, copper, nickel, pewter, zinc, gold, silver, platinum, aluminum, or other metal, * * ." under paragraph 199 of said act. The Government contests this finding and contends for the former, upon the theory that while the aggregate metal content of the bulbs constitutes chief value, no single metal therein is such, and that but one of the kinds of component metal materials should be considered in this ascertainment.

The record shows the metal content composed of "metal base," "nickel," "copper," "platinum," and "solder," the proportion of each being stated.

This so-called "catchall" clause of the metal schedule in tariff legislation first appeared in the tariff act of May 2, 1792. If this theory of the Government be accepted in this case it will overturn the accepted and enforced construction of that paragraph and its successors from that date to the present, a period of over one hundred and twenty-two years. It is true that when there is a competing provision of the law which specifically singles out and mentions manufactures of, or a manufacture of, or *eo nomine* designates one of these or any specific metal, that quantity of such metal in the manufacture can not be weighed in and included as against the particular competing provision. Such is illustrated in *G. A. 4839* (T. D. 22725). The doctrine of that case is aptly stated in the syllabus:

In ascertaining the chief component it is improper to group together *all* the components which are in their character wood *when any of them are separately provided for by name.*

Where, however, there is no such competing provision the uniform rule has been and is as applied by the Supreme Court of the United States in *United States v. Klumpp* (169 U. S., 209). The question was whether "worsted" fell within the term "manufactures of wool." The court said:

We think that the words "manufactures of wool," in paragraph 297, had relation to the raw material out of which the articles were made, and that as the material of worsted dress goods was wool, such goods fell within the paragraph—

and held worsteds such a material within the term "manufactures of wool." So "manufactures of metal" refers to the material and includes all the component classes of such by whatever distinctive name they may be known as distinguishing them from other kinds of metal. They are all metal. The statute, paragraph 481, refers to "each single component material" and not to each single component kind or class of a material. Indeed, did the statute so refer the rule here would be the same, for instead of manufactures of the individual metals composing this article being named in competing paragraphs they are all named specifically in this paragraph so far as their character is by the evidence disclosed, to wit, "nickel," "copper," and "platinum," the residue being provided for as "other metals."

It follows that the decision should be, and is, *affirmed*.

UNITED STATES v. SHELDON & Co. (No. 1406).¹

CATGUT, WHIP GUT, OR WORM GUT, WHEN MANUFACTURED.

This merchandise consists of various strands of gut twisted in the form of a rope or cable and then apparently coated with a light varnish-like material. It clearly falls within the description of a manufacture of catgut.—*Fischer v. United States* (5 Ct. Cust. Appls., 301; T. D. 34477).

United States Court of Customs Appeals, November 18, 1914.

APPEAL from Board of United States General Appraisers, Abstract 35422 (T. D. 34416).

[Reversed.]

Bert Hanson, Assistant Attorney General (*Charles D. Lawrence*, special attorney, on the brief), for the United States.

Submitted on record by appellees.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

The merchandise in this case was assessed for duty as a manufacture of catgut or whip gut at 25 per cent ad valorem under paragraph 462 of the act of August 5, 1909, which provides a duty of 25 per cent on "manufactures of * * * catgut or whip gut or

¹ Reported in T. D. 34944 (27 Treas. Dec., 540).

worm gut." The protestant claimed free entry for the merchandise under paragraph 529 of the act which reads:

Catgut, whip gut, or worm gut, unmanufactured.

The report of the appraiser, in answer to the protest, states that "the merchandise in question is cable made of gut to be used similarly to belting. These cables come in lengths of approximately 100 feet."

The testimony of the importer's witnesses shows that he produced a sample which in no way tends to show that the merchandise is not correctly described in the report of the appraiser, except that he states the length to be about 50 feet instead of 100 feet. The merchandise is described by him as being about 50 feet long and about seven-sixteenths of an inch in diameter. In answer to the question, "Do you know what has been done to this—it is manufactured as it is—it is not just as it came out of the intestines?" stated, "It is in the crudest form I know of."

A further question was put by the general appraiser: "But it is not as it comes out of the animal—you do not claim that?" to which he replied, "No, sir."

"Q. Do you know what is done to it? A. No, sir."

An inspection of the article, however, discloses that it evidently consists of various strands of gut which are twisted in the form of a rope or cable and then apparently coated with a light application of some material in the nature of a varnish or oil. It is apparently well adapted to use for belting purposes, and requires no further manufacture for that purpose. The testimony of the witness falls far short of showing that the article imported is in its crude form. He does state that it is in the crudest form he knows, but this may be the crudest form of the witness's own importations. That it is the crudest form of catgut is clearly disproved by an inspection of the article itself.

We think the article clearly falls within the description of a manufacture of catgut. See *Fischer v. United States* (5 Ct. Cust. Appls., 301; T. D. 34477).

The cases cited by the general appraiser in sustaining the protest do not go to the length of supporting the conclusion which was reached. The case T. D. 23640 describes the character of the merchandise involved in these cases as being gut of the silk worm, dried and cleaned, put up in bundles and intended to be manufactured into "snells" or "leaders" for fishing lines; also catgut strings intended to be made into surgical sutures, ligaments, etc. No article adapted to use had been manufactured of the material in the cases cited. In this case, as before stated, the article is adapted to use as belting without anything further being done to it. It falls well within the definition of a manufactured article.

The decision of the board is *reversed*.

NEVIN v. UNITED STATES (No. 1408).¹

1. BOTTLE CAPS OF METAL.

"Bottle caps of metal" in paragraph 196, tariff act of 1909, is not to be deemed a term of exclusion forbidding classification by similitude thereunder.—*Strauss & Co. v. United States* (2 Ct. Cust. Appls., 203; T. D. 31946).

2. BOARD'S FINDING OF FACT ON REVIEW.

The board's conclusion here was a finding of fact, and such a finding will not be reviewed here unless the finding is wholly without evidence to support it or is clearly contrary to the weight of evidence.

3. IBID.

The uncontradicted testimony shows the especial design and use of the cap of the importation is to form an air-tight and air-sealed cap, whether for bottles or tubes, but metal caps do not adhere and do not effect a like purpose. These caps were not dutiable by similitude as metal caps.

United States Court of Customs Appeals, November 18, 1914.

APPEAL from Board of United States General Appraisers, G. A. 7554 (T. D. 34375).

[Reversed.]

Curie, Smith & Maxwell (Thomas M. Lane of counsel) for appellant.

Bert Hanson, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, of counsel), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

DE VRIES, Judge, delivered the opinion of the court:

These importations consist of so-called viscose caps. They were returned by the appraiser at the port of New York as "bottle caps composed of viscose" and assessed for duty by the collector by similitude to "bottle caps of metal" under the provisions of paragraph 196, tariff act of 1909, reading as follows:

196. Bottle caps of metal, if not colored, waxed, lacquered, enameled, lithographed, or embossed in color, one-half of one cent per pound and forty-five per centum ad valorem; if colored, waxed, lacquered, enameled, lithographed, or embossed in color, fifty-five per centum ad valorem.

And paragraph 481, as follows:

481. That each and every imported article, not enumerated in this section, which is similar, either in material, quality, texture, or the use to which it may be applied, to any article enumerated in this section as chargeable with duty, shall pay the same rate of duty which is levied on the enumerated article which it most resembles in any of the particulars before mentioned; * * *.

They are claimed by appellants to be dutiable as nonenumerated manufactured articles under paragraph 480 of the same act. On appeal counsel for the importer at oral argument urged that the express language of paragraph 196, "bottle caps of metal," was such a term of limitation as *ex vi termini* excluded classification by simili-

¹ Reported in T. D. 34945 (27 Treas. Dec., 542).

tude thereunder of all articles not within its literal terms. This court, however, in *Strauss & Co. v. United States* (2 Ct. Cust. Appls., 203; T. D. 31946), laid down the rule that such exclusion would not be assumed or implied from mere descriptive or *eo nomine* language of a paragraph, but there must be express language of exclusion or of condition tantamount to the same. See also *Fensterer & Ruhe v. United States* (1 Ct. Cust. Appls., 93; T. D. 31110, at page 96 *et seq.*). These cases rule that issue here. The language of this paragraph is merely *eo nomine*, followed by expressed alternative conditions with one of which at least these importations are susceptible of compliance.

The Board of General Appraisers rested their decision upon similitude of use. They stated:

Now, as said paragraph 196 specifically provides for "bottle caps of metal," and as the caps or capsules here in controversy are composed of viscose, it is at once apparent that, at least so far as material, quality, or texture is concerned, there exists no similarity whatever between the two articles.

Therefore the collector's classification and assessment of the merchandise in suit must stand or fall on the answer to this question, Are these viscose caps or capsules similar in the use to which they may be applied to the bottle caps of metal covered by said paragraph 196? We think they are; and we believe our conclusion is amply supported by the testimony of the importer's own witness. Asked the question, "Could a metal bottle cap be used on such a tube?" he replied, "It could be used on the tube, yes; it could be—a bottle cap could be sealed on anything in the shape of a round neck, piece of glass, but it is a question of putting a cap on to evolve a purpose."

Now, while we do not concede that jars or tubes are by any means bottles, nevertheless it is not a fact that, if metal caps for bottles may serve the same purpose with respect to the tubes in question as do the viscose caps under consideration, the latter, by reason of their structure, form, and pliability, would serve the same function with reference to bottles as is performed by metal caps? Certainly the result sought to be accomplished is precisely similar in each case—that of sealing or covering the mouth or opening of the vessel.

Again, it is not essential that the vessel should be a bottle; to merely establish that the use for which the article is designed is similar to that for which bottle caps are employed is sufficient to fix its dutiable classification. The similitude provision in the statute plainly refers to a similarity in the employment of an article or its effect in producing similar results. *Murphy v. Arnson* (96 U. S., 131).

It is likewise unnecessary to establish a similarity in more than one particular. It is enough if there be a substantial similitude in any one of the particulars mentioned—material, quality, texture, or use. *Arthur v. Fox* (108 U. S., 125); *Pittsburgh Plate Glass Co. v. United States* (2 Ct. Cust. Appls., 389; T. D. 32162).

In Abstract 32871 (T. D. 33591) this board, in commending upon the use to which articles similar to those here in question were employed, said:

The article is used in capping dental cement. It is form of a preparation of viscose which, while kept submerged in liquid, remains in a soft, pliable condition, and which, when put over the cork of a bottle and left to dry, shrinks, forming an air-tight and sealed cap for the bottle and its contents.

The conclusion of the board that there is no direct provision of the tariff law applicable to the merchandise and that the similitude

provision is the one applicable is a decision of a question of law. *United States v. Hahn* (91 Fed., 755), *Herrman v. Arthur's Executors* (127 U. S., 363).

Whether or not there was a similitude in use between bottle metal caps and these viscose caps was a question of fact for the board to determine, its conclusion being a finding of fact. *Greenleaf v. Goodrich* (101 U. S., 278), *Herrman v. Arthur's Executors* (127 U. S., 363).

It follows, the first proposition being undisputed, that the court will not review the finding of the board on that question of fact unless the finding is wholly without evidence to support it or is clearly contrary to the weight of evidence. *United States v. National Aniline & Chemical Co.* (3 Ct. Cust. Appls., 10; T. D. 32287), *United States v. Reibe* (1 Ct. Cust. Appls., 19; T. D. 30776), *Holbrook v. United States* (1 Ct. Cust. Appls., 263; T. D. 31317), *Carson v. United States* (2 Ct. Cust. Appls., 105; T. D. 31656).

We are of the opinion, however, considering the whole record and all its parts, that the finding is at least clearly contrary to the weight of the evidence. But one witness testified, and the board rests its decisions particularly upon a part of his testimony and comments upon its finding in another case.

As to the comparative uses of these caps, the witness testified that the articles are viscose caps imported in large jars packed in alcohol to preserve them; that when the alcohol evaporates or they are taken out they harden.

Q. The alcohol keeps it soft?—A. The alcohol keeps it soft.

Q. Will you please describe the manner of using these caps?—A. Well, there is a tube; we put them on a tube that has no neck at all, just a straight, long tube, and the reason why this cap is applicable for that tube is because when it is pulled over the top of the cork, over part of the tube, it hardens and adheres there. It is not like a metal cap that sets simply down on the neck of a bottle, but this has a gelatin appearance. We do not know whether it is gelatin or not, and for that reason it sticks on the tube, but it does not fit as you say, our expression about a bottle cap, it does not fit, it does not catch, adhere.

* * * Q. Are these viscose caps used on bottles?—A. No; we do not—

Q. What are they used on?—A. Tubes.

Q. Test tubes?—A. Yes; tubes of a test appearance.

Q. Could a metal cap be used on such a tube?—A. It would not have the same—it would not be applicable at all.

Mr. BALDWIN. I ask that the answer be stricken out.

General Appraiser FISCHER. Strike out the answer.

The last question was repeated by the stenographer as follows:

Q. Could a metal bottle cap be used on such a tube?—A. It could be used on the tube, yes; it could be—a bottle cap could be sealed on anything in the shape of a round neck, a piece of glass, but it is a question of putting a cap on to evolve a purpose. It is not merely—

Mr. BALDWIN. You have answered the question.

Q. What material do these tubes contain?

Mr. BALDWIN. I object to that unless it is shown that the witness knows.

Q. Do you know?—A. Yes, I do know. They contain products which when put in a glass of water evaporate. These products absorb moisture from the air. They need a cap which will be impervious to the air and prevent any moisture absorbing through the cork.

Q. What would be the effect of moisture in the product?—A. It would break down the products, it would crumble them down.

Q. What is the purpose of using such a cap, Mr. Nevin, as this cap here, on such products as you describe?—A. Well, I have just answered that question. It is for the purpose of preventing air from getting through which it would undoubtedly with a metal cap, which can not be fastened—adhere.

Q. Would the air break down these products as well as the moisture?—A. Positively, yes.

* * * * *
Q. Do you know any use for them except that of air-tight sealing?—A. Air-tight sealing.

Q. Or capping a tube? A.—That is all we use it for. You can use them over anything for air-tight sealing, use them over a suppository or—

The witness further testified that these caps were put on by hand and could not be put on by machinery as are bottle caps.

The board, as quoted, deduces from this testimony:

Nevertheless, is it not a fact that, if metal caps for bottles may serve the same purpose with respect to the tubes in question as do the viscous caps under consideration, the latter, by reason of their structure, form, and pliability, would serve the same function with reference to bottles as is performed by metal caps?

We think the deduction unsupported by this record. The witness nowhere said that the uses of the caps were interchangeable. The most he could have been held to have said was that the metal caps "*could* be used on the tube, yes; it *could* be—a bottle cap *could* be sealed on anything in the shape of a round neck, a piece of glass, but it is a question of putting a cap on to *evolve a purpose*." The witness did not in our opinion here state what is done practically or commercially with bottle caps, but what "*could*" be done, not commercially and practically, but perhaps experimentally or by physical possibility. There is not a word of testimony controverting the qualifying statement of the witness that these caps are to "*evolve a purpose*," later explained to be of "*air-tight sealing*." That also was the use the board found in Abstract 32871 (T. D. 33591), cited in its opinion as a precedent. Nor is the statement of the witness disputed (p. 9, record) that "*it is for the purpose of preventing air from getting through, which it would undoubtedly with a metal cap, which can not be fastened—adhere.*"

So that it would appear uncontradicted that the especial use and design of this cap is to form an air-tight and air-sealed cap whether for bottles or tubes, and that metal caps do not adhere and do not effect this purpose. Common knowledge suggests that metal bottle caps are either ornamental or used to protect and hold in place the cork of the bottle. Viscous caps are used to hermetically seal the contents of bottles or tubes; metal bottle caps are used to protect and

hold in place the corks of bottles or tubes. The uses, therefore, are distinctly different. We are, therefore, of the opinion that the record does not sustain the finding of the board and that its decision should be, and is, *reversed*.

UNITED STATES v. SHELDON & Co. (No. 1415).¹

1. PROTEST—A CARDINAL RULE OF.

At the time he makes his protest the importer must have in mind the objection afterwards made at the trial, and must sufficiently, in view of all the circumstances, call the collector's attention to that objection.

2. PROTEST—WHEN INSUFFICIENT.

These several protests here were made at different dates, all relating to the same class of merchandise, and in each claim was made under paragraph 415, tariff act of 1909. This claim can not be said to direct the collector's attention to paragraph 420, nor do the facts warrant the opinion that paragraph 420 was in the mind of the importer when he claimed under paragraph 415.

United States Court of Customs Appeals, November 18, 1914.

APPEAL from Board of United States General Appraisers, Abstract 35500 (T. D. 34425).

[Reversed.]

Bert Hanson, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, on the brief), for the United States.

Allan R. Brown for appellees.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

BARBER, Judge, delivered the opinion of the court:

The issue here is as to the sufficiency of certain protests, the material parts of which are hereinafter set forth. All these protests contain a column entitled "Description of merchandise," in which is inserted a statement as to the number of cases or other packages, followed by the words which are hereinafter quoted as describing the merchandise.

Protest 725587/32983 describes the merchandise as "cardboard" and alleges dutiability as "mftrs. of cardboard" at 35 per cent ad valorem under paragraph 415.

Protest 722623/30607 describes the merchandise as "mf. cardboard" and alleges dutiability as "mf. cardboard n. s. p. f." at 35 per cent ad valorem under paragraph 415.

Protest 707123/16073 describes the merchandise as "cardboard" and alleges dutiability as "mfrs. of paper n. s. p. f." at 35 per cent ad valorem under paragraph 415, or as "articles composed in chief value of paper with coated surface" under paragraph 411.

Protest 685077/74 describes the merchandise as "mf. cardboard" and alleges dutiability as "mftrs. of cardboard" at 35 per cent ad valorem under paragraph 415, or as "articles composed in chief value of paper with coated surface n. s. p. f." under paragraph 411.

¹ Reported in T. D. 34946 (27 Treas. Dec., 546).

Protest 693549/5322 describes the merchandise as "cardboard" and alleges dutiability as "mftr. of paper n. s. p. f." at 35 per cent ad valorem under paragraph 415, or as "articles composed in chief value of paper with coated surface" under paragraph 411.

Protest 699602/7427 describes the merchandise as "mf. cardboard" and alleges dutiability as "mfr. of paper n. s. p. f." at 35 per cent ad valorem under paragraph 415, or as "articles composed in chief value of paper with coated surface n. s. p. f." under paragraph 411.

Protest 683507/52750 describes the merchandise as "mftr. paper" and alleges dutiability as "mftrs. of paper n. s. p. f." at 35 per cent ad valorem under paragraph 415, or as "articles composed in chief value of paper with coated surface" under paragraph 411.

No claim is made that the merchandise is dutiable under paragraph 411, which is referred to in some of the protests.

Giving to the various abbreviations their natural import it is manifest that these protests fall into the following classes, so far as they contain a description of the importations and the claim as to proper classification:

(a) Three of the protests describe the merchandise as cardboard or manufactures of cardboard and aver that it is dutiable as "manufactures of cardboard."

(b) Two of the protests describe the merchandise as cardboard and aver that it is dutiable as a "manufacture of paper n. s. p. f."

(c) One of the protests describes the merchandise as a manufacture of cardboard and claims it is dutiable as a "manufacture of paper n. s. p. f."

(d) One of the protests describes the merchandise as a manufacture of paper dutiable as a "manufacture of paper n. s. p. f."

And all the protests refer to paragraph 415 as the one under which the merchandise is claimed to be dutiable and all claim 35 per cent ad valorem as the proper rate of duty.

Paragraph 415 specifically provides, among other things, for cardboard, which is declared to be dutiable at 35 per cent ad valorem. It also contains two other provisions for the same rate of duty, one upon certain press boards or press paper, and the other upon certain wrapping paper, with a further proviso that certain paper, embossed, die cut, or stamped into designs or shapes, or certain other forms, is dutiable at the same rate.

Paragraph 420 provides that manufactures of paper or of which paper is the component material of chief value, not specially provided for, shall be dutiable at 35 per cent ad valorem.

Each of these seven protests bears a different date, and five contain an alternative claim in substance that the merchandise is dutiable as in chief value of surface-coated paper under paragraph 411.

It is unnecessary to review at length the great number of authorities in which the question of the sufficiency of protests has been considered.

It was held in substance in *Bliven v. United States* (1 Ct. Cust. Appls., 205) that one cardinal rule in construing a protest is that it must show fairly that the objection afterwards made at the trial was in the mind of the party at the time the protest was made and was brought to the knowledge of the collector to the end that he might ascertain the precise facts and have an opportunity to correct the mistake and cure the defect if it was one that could be obviated. This, in effect, has long been the doctrine enunciated by the Supreme Court of the United States. *Davies v. Arthur* (96 U. S., 148), *Arthur v. Morgan* (112 U. S., 495), *United States v. Salambier* (170 U. S., 621). See also *Carter v. United States* (1 Ct. Cust. Appls., 64; T. D. 31033) and *Sonneborn's Sons v. United States* (3 Ct. Cust. Appls., 54; T. D. 32348).

In the various cases where this principle has been upheld it will appear that in some the correct paragraph has been cited without mentioning the rate of duty; again, the correct rate has been mentioned without referring to the paragraph; and other discrepancies and infirmities have been considered and discussed. It has, however, uniformly been considered, as already suggested, that one great rule of construction is that *at the time he makes his protest the importer must have in mind the objection afterwards made at the trial* and must sufficiently, in view of all the circumstances, call the collector's attention thereto, so that he may consider and pass upon the same; and the determination of this case must stand or fall upon the application of that rule.

It is conceded here that the importers did not select the proper paragraph, but it was held by the board and is claimed by the importers that this was an inadvertence; in other words, that the importers really meant to refer to paragraph 420 instead of 415. As already suggested, each of these protests bears a different date and five make an alternative claim under paragraph 411. As a matter of inference or argument the claim of the protestants would be more persuasive if it appeared that the alleged inadvertence had occurred but once; but when we find, as here, seven protests bearing different dates, none however greatly removed from another in point of time, all having been made between December 19, 1912, and October 10, 1913, and all relating to the same class or kind of merchandise, it is strongly suggestive not of an inadvertence but of a deliberate purpose to claim under paragraph 415, and that this was the paragraph which was in the minds of the protestants at the time the protests were made, was the one upon which they then relied, and intended to rely at the trial. This view is strengthened by the fact that five of the protests, in the alternative, claim under paragraph 411, which tends to show that the protests were carefully and not hurriedly drawn. It is hard to believe that the claim under paragraph 415 was inadvertently made.

Was the collector's attention fairly directed to paragraph 420? Of course the number of the paragraph to which he was referred was 415. He was advised, as evidently the entries in the case had advised him, that the merchandise was claimed to be in every case but one, cardboard or a manufacture of cardboard; that in three of the protests it was claimed to be dutiable as a manufacture of cardboard and in the other four as a manufacture of paper n. s. p. f. The exhibits in the case which are before us show that the background or the basic material is a relatively thick piece of cardboard upon which are raised letters said to be of metal. As to the composition of these letters no question is made. Paragraph 415 contains no express provision for manufactures of cardboard nor manufactures of paper by that name, but does contain, as already pointed out, a provision for cardboard and various forms of boards and paper with four separate provisions for duty at the rate of 35 per cent ad valorem, which is the identical rate claimed in the protests.

We think under the terms of the protests the attention of the collector was not directed to paragraph 420 just as we think that the provisions of paragraph 420 were not in the minds of the importers when the protests were made.

This view is somewhat confirmed by the fact that paragraph 420 refers to manufactures of paper or manufactures of which paper is the component material of chief value. The protests do not claim the merchandise to be manufactures of which paper is the component material of chief value, but simply as manufactures of paper, while the merchandise itself shows, the evidence is, and the report of the appraiser in each case was, that the merchandise was a manufacture of paper and *something else*.

We think it was error to hold these protests sufficient, and the judgment of the Board of General Appraisers is *reversed*.

UNITED STATES *v.* TROY LAUNDRY MACHINERY CO. (No. 1418).¹

PROTEST—WHEN INSUFFICIENT.

The protest here not only expressly refers the collector to a paragraph but avers the merchandise to be of a kind that is provided for in that paragraph alone, and claim is made thereunder. The protestant is bound by this specific allegation and his protest could not avail to give him the benefit of yet another and different paragraph of the law.

United States Court of Customs Appeals, November 18, 1914.

APPEAL from Board of United States General Appraisers, G. A. 7565 (T. D. 34457).

[Reversed.]

Bert Hanson, Assistant Attorney General (*Charles D. Lawrence*, special attorney, on the brief), for the United States.

Submitted on record by appellee.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

¹ Reported in T. D. 34947 (27 Treas. Dec., 550).

DE VRIES, Judge, delivered the opinion of the court:

This appeal may be determined by ruling as to the sufficiency of the protest. The material allegation of the protest it as follows:

We claim and insist that this merchandise is caustic potash, as specifically provided for at 1 cent per pound in paragraph 61 of the tariff act of August, 1909.

Paragraph 61 reads:

61. Caustic potash, or hydrate of, refined, in sticks or rolls, one cent per pound; chlorate of, two cents per pound.

The Board of General Appraisers held merchandise such as this entitled to free entry under paragraph 655 of the act, which reads:

655. Potash, crude, or "black salts"; carbonate of potash, crude or refined; hydrate of, or caustic potash, not including refined in sticks or rolls; nitrate of potash or salt-peter, crude; sulphate of potash, crude or refined, and muriate of potash.

The board upheld the sufficiency of the protest. The Government appeals. Much stress is laid by the board in its opinion upon the fact that the protest *eo nomine* counts upon "caustic potash."

If "caustic potash" were provided for *eo nomine* in but one of these paragraphs there might be much force in that position. *Smith et al. v. Schell et al.* (27 Fed., 648), *Cummins et al. v. Robertson* (27 Fed., 654), *In re Austin et al.* (47 Fed., 873). Being so provided for, however, in both paragraphs, at least the name being used in both as related to different kinds of the merchandise, the reason of the rule fails and it has here no application. Furthermore, the protest not only makes claim as to caustic potash but expressly directs the collector's attention to that "caustic potash, as specifically provided for * * * in paragraph 61 of the tariff act of August, 1909." The protest, therefore, not only cites the wrong paragraph but expressly refers the collector to a kind of merchandise provided for in that paragraph alone, and not provided for in paragraph 655. Of such a protest this court in *Bliven v. United States* (1 Ct. Cust. Appls., 205-208; T. D. 31239), said:

The cardinal principle underlying the sufficiency of protests being that the protestant must direct the mind of the collector to the appropriate provision of law. It cannot by any stretch of imagination be said that this requirement is satisfied when the protestant directs the mind of the collector to some other provision of law assessing a different rate of duty. Such is a more violent contravention of the requirement because it not only does not leave the mind of the collector free to determine for himself the appropriate provision, but carries his mind away from the applicable clause to an inapplicable one, and thus confuses the situation.

Oelrichs & Co. v. United States (3 Ct. Cust. Appls., 232; T. D. 32541).

The ruling rests upon the fundamental principle of pleading and practice, applicable also to customs protests, that where an importer states with specificity his objections he is limited thereby. He is bound by the allegations of his protest. *Benjamin Iron & Steel Co.*

v. United States (2 Ct. Cust. Appls., 159; T. D. 31667), *United States v. Danker & Marston* (2 Ct. Cust. Appls., 462; T. D. 32208), *Bowling Green Storage & Van Co. v. United States* (3 Ct. Cust. Appls., 309; T. D. 32588), *United States v. Park & Tilford* (3 Ct. Cust. Appls., 350; T. D. 32907), *United States v. Chattanooga Brewing Co.* (3 Ct. Cust. Appls., 375; T. D. 32965), *Strakosh v. United States* (1 Ct. Cust. Appls., 360; T. D. 31453), *In re Solvay Process Co.* (134 Fed., 678), *Herrman v. Robertson* (152 U. S., 521), *Presson v. Russell* (152 U. S., 577), *United States v. Curley et al.* (66 Fed., 720), *United States v. George Knowles & Son* (126 Fed., 737), *United States v. H. Bayersdorfer & Co.* (126 Fed., 732), *United States v. Fleitmann et al.* (137 Fed., 476), *Davies v. Arthur* (96 U. S., 148).
Reversed.

UNITED STATES *v.* VAN INGEN & Co. *et al.* (No. 1327).¹

SHRINKAGE AS A CHARGE OR EXPENSE—SUBSECTION 18 OF SECTION 28, TARIFF ACT OF 1909.

The importer of these woollens incurred certain costs for their inspection and damping in London and the collector added these costs to the entered value. In this he exceeded his authority. These costs so incurred are not charges and expenses incident to placing the merchandise in condition packed ready for shipment to the United States, as provided for in subsection 18 of section 28, tariff act of 1909.—*United States v. Spingarn* (5 Ct. Cust. Appls. 2; T. D. 34002), distinguished.

United States Court of Customs Appeals, November 27, 1914.

APPEAL from Board of United States General Appraisers, Abstract 34066 (T. D. 33872.

[Affirmed.]

Bert Hanson, Assistant Attorney General (*Thomas J. Doherty*, special attorney, of counsel; *Samuel Isenschmid*, assistant attorney, on the brief), for the United States.
Allan R. Brown and *Gerry & Wakefield* for appellees.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

The importers are engaged in the business of importing English and Scotch woollens for men's clothes. They maintain a warehouse in London. Their course of business is to purchase goods at various points in Great Britain. Those in question in this case were purchased at Huddersfield. The goods are shipped to the London office of the importers in bales. The practice prevails by the present importers to send these bales of goods out of their office to concerns called dampers and examiners. These dampers or examiners send their own vans for the goods, and after treatment return them to the warehouse of the importer in the same form in which they were received, except as defects, if any, in the goods are shown, as herein-

¹ Reported in T. D. 34970 (27 Treas. Dec., 574).

after stated. The process pursued by these dampers or inspectors is to unroll the goods, place them over perches, and make a thorough examination to ascertain if there are any defects in the cloth in width, color, or general appearance. If any such are found, the defect is marked on the edge of the selvage with a string. The unrolling and suspending of these goods over perches having resulted in giving them a rough appearance, they are then dampened and pressed into the form in which they came originally from the manufacturer, and returned to the importer's office. The expense of this treatment amounts to about a penny a yard.

The goods in question were imported and invoiced at the price paid by the importer, and a notation was made of the expense of inspection and damping, which item was deducted from the total by the importer. The local appraiser made an addition to cover the cost of shrinkage, inspection, and damping, and from this decision an appeal to reappraisalment was taken, and the general appraiser made an order "entered value sustained." The collector, however, assessed duty, not only upon the value as entered, to wit, the original cost to the importer, but added the item paid for shrinkage, so called, as a cost charge and expense under subsection 18 of section 28 of the tariff act of 1909. The importer filed his protest to this action of the collector, and on hearing the protest was sustained. The Government has brought this appeal, and the question presented is whether the item for treatment of the cloth, as above stated, is subject to assessment by the collector as an item of cost, charge, or expense under subsection 18.

Subsection 18 provides:

* * * The duty shall be assessed upon the actual market value or wholesale price thereof, at the time of exportation to the United States, in the principal markets of the country from whence exported; that such actual market value shall be held to be the price at which such merchandise is freely offered for sale to all purchasers in said markets, in the usual wholesale quantities, and the price which the manufacturer or owner would have received, and was willing to receive, for such merchandise when sold in the ordinary course of trade in the usual wholesale quantities, including the value of all cartons, cases, crates, boxes, sacks, casks, barrels, hogsheads, bottles, jars, demijohns, carboys, and other containers or coverings, whether holding liquids or solids, and all other costs, charges and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States, * * *.

The question presented naturally divides itself. It is, first, a question whether the item for the service in question is dutiable at all, or whether it is to be treated as a charge kindred to that of a commission paid by the importer for ascertaining the condition and character of the goods as preliminary to the final acceptance of the same; and, secondly, whether if it be dutiable at all it be not a part of the value of the goods at the time of exportation. The section above quoted provides that the value at the time of exportation to the

United States in the principal markets of the country from whence exported is to be the controlling value.

The Board of General Appraisers in deciding the case rested its decision upon an opinion previously filed in T. D. 33882, in which it was held that the charge in question was not a charge to be ascertained by the collector, but if a charge dutiable at all, it was an item which should have been added to the *per se* value of the goods.

The case of *United States v. Spingarn* (5 Ct. Cust. Appls., 2; T. D. 34002) is relied upon by the Government as sustaining the power of the collector to proceed by ascertainment to determine the amount of these charges and to impose duty thereon. But we agree with the Board of General Appraisers in the case cited that under subsection 18 it is the duty of the collector to assess duty upon the actual market value or wholesale price at the time of exportation to the United States. The expense in question having been incurred prior to the date at which the market value is to be found by the appraiser, the item, if dutiable, must be deemed to have entered into the cost of the merchandise to the importer, and it is to be presumed that it entered into consideration of the general appraiser in determining its market value. London is shown by the evidence to be the market for such merchandise, and it is further shown that merchandise which has been shrunk and inspected is the subject of sale in the London market. The expression "other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States," must be construed in connection with what precedes it, which relates to the value of cartons, cases, boxes, etc., and it must be held that the charges and expenses spoken of generally were the charges and expenses of the same general kind and character as those specifically enumerated. Those here in question were not of this character. They related to the inspection of the goods, which might have preceded the receipt of them into the warehouse of the importers, and in the case of some importers did precede such receipt. But the charges had nothing whatever to do with the exportation from London to the United States or with putting the merchandise in condition for shipment. They were not charges and expenses *incident* to placing the merchandise in condition packed ready for shipment to the United States. The same treatment would have been necessary had the importer seen fit to sell these goods in the local market or for exportation to other countries than the United States.

The case is of course clearly distinguishable from that of *United States v. Spingarn*, in that there the cost in question was one, strictly speaking, for the purpose of placing the goods in condition ready for shipment.

Reaching the conclusion, as we do, that the Board of General Appraisers was right in holding that in no view was this charge or

cost a charge or cost within the meaning of these words used in subsection 18, it becomes unnecessary to discuss the other question as to whether this item would be a dutiable item under any circumstances if included as a part of the actual market value of the goods at the time of exportation. For there being no authority of the collector to proceed to ascertain these costs, charges, and expenses, the action of the appraiser must be held final as to the value of the merchandise and the collector must be held to have exceeded his authority.

The decision of the board is *affirmed*.

NATIONAL HAT PIN CO. v. UNITED STATES (No. 1352).¹

1. PRESUMPTION OF CORRECTNESS OF COLLECTOR'S ACTION.

Upon the coming in of the protest it is the duty of the collector to forward within 30 days the invoice and all the papers and exhibits connected therewith to the board, unless, of course, reliquidation had been considered proper. In this case a memorandum made by the collector subsequent to the lapse of the 30 days can not be deemed the collector's decision. He was without further jurisdiction and such a memorandum does not overcome the presumption of correctness which attaches to the decision already made and entered.

2. CITATION OF FORMER DECISION OF BOARD.

The mere citation to a former decision by the board by the appraiser in his report to the collector is not sufficient to identify the merchandise in the two cases.—*United States v. Eytinge* (4 Ct. Cust. Appls., 266; T. D. 33486).

United States Court of Customs Appeals, November 27, 1914.

APPEAL from Board of United States General Appraisers, Abstract 34521 (T. D. 34090).

[Affirmed.]

Brown & Gerry for appellant.

Bert Hanson, Assistant Attorney General (*Leland N. Wood*, special attorney, of counsel), for the United States.

Before MONTGOMERY SMITH, BARBER, DE VRIES, and MARTIN, Judges.

BARBER, Judge, delivered the opinion of the court:

The record in connection with the files in this case shows the following facts: The entry was made at the port of New York February 17, 1911, and liquidated May 17 of the same year. The protest was received by the collector June 1, 1911, the material part of which is as follows:

HON. COLLECTOR OF CUSTOMS,

Port of New York.

SIR: Notice of dissatisfaction is hereby given with, and protest is hereby made against, your ascertainment and liquidation of duties and your decision assessing duty at 45 per cent ad valorem or other rate or rates on hatpin heads, settings, or similar merchandise covered by entries below named. The reasons for objection under the tariff act of August 5, 1909, are as follows: Said merchandise is covered by and is dutiable under the last part of paragraph 449 (as imitation precious stones or

¹ Reported in T. D. 34971 (27 Treas. Dec., 577).

otherwise) at only 20 per cent ad valorem, or the first part of paragraph 449 (as pearls, or diamonds, or otherwise) at only 10 per cent ad valorem, or the first part of paragraph 421 (as beads) at only 35 per cent ad valorem, or paragraph 462 (as manufactures wholly or in chief value of amber, or wax, or otherwise) at only 25 per cent ad valorem, or paragraph 464 (as shells or as manufactures wholly or in chief value of mother-of-pearl or shell or otherwise) at only 35 per cent ad valorem, or paragraph 480 at only 10 per cent ad valorem or only 20 per cent ad valorem. * * *

The appraiser's written answer to the protest, dated November 10, 1911, was that "the merchandise consists of hatpin heads of glass, returned as mf. of glass at rate of 45 per cent, paragraph 109, act of August 5, 1909. Note G. A. 7267 (T. D. 31844)."

November 15, 1911, the deputy collector returned to the appraiser his above answer to the protest with the following indorsement thereon:

APPRAISER: Please report whether the merchandise referred to herein is in imitation of precious stones.

On the 7th of December, 1911, the appraiser, who made the original report, returned the document to the collector with the indorsement:

COLLECTOR: The within described merchandise is in imitation of precious stones.

On the 16th of December, 1911, the collector forwarded these papers, including the protest, to the Board of General Appraisers with the following indorsement thereon:

NEW YORK, December 16, 1911.

Respectfully referred to the Board of United States General Appraisers for decision.

The assessment of duty protested against was made in accordance with the return of the appraiser on the invoice as stated in his special report herewith, dated 10/11/11,

In view of said report the protest appears partly valid, and this office stands ready to reliquidate accordingly if authorized by your board.

The protest was filed in statutory time.

WM. LOEB, Jr., Collector.

On the 19th of January, 1914, Board No. 1 of the Board of General Appraisers filed its decision in the case, saying therein, among other things, that the importer had submitted the protest on the appraiser's report, and further saying that—

It will be observed the appraiser's report was that the merchandise consists of hatpin heads composed of glass. The appraiser did not report that the merchandise in this protest was similar to and of the same character and class as that referred to in the authority cited, and no effort was made by the importer to connect the merchandise in question with the merchandise referred to therein, nor did he move the record in G. A. 7267 (T. D. 31844) into the record in the case at bar.

In *United States v. Lun Chong & Co.* (3 Ct. Cust. Appls., 468; T. D. 35401) the court held that unless a previous record is moved into the case on trial it can not be taken for granted that the merchandise is similar, although the collector may in his report so state. It was there said:

It is not contended in this court by counsel for the importer that, standing alone, the mere submission of a case by reference to a former case imports into the present

record the testimony in the former case; but it is said that as the record shows that the collector, in his letters transmitting the protests, reports that the merchandise in the instant case is like that in the case cited, the former case should be held *stare decisis*. This is carrying the rule of *stare decisis* further than the law justifies. When the present issue came on for trial, the presumption that the collector's action was correct obtained. It was incumbent on the importer, therefore, to overcome this presumption. The citation of a former case did not challenge the attention of the Government in the claim that the testimony in that case was to be made the basis of a decision in the present.

It would appear from this holding that the mere citation of an authority does not overcome the presumption of correctness attaching to the action of the collector. That the cited authority may be used for the principle enunciated is correct, but as to the merchandise involved the presumption of similarity does not attach.

The protest is overruled.

From this decision of the board the importer brings his appeal to this court.

It is here contended by the importer that "there is no presumption of correctness attaching to the original action of the collector in the case at bar; or, if there is such a presumption, it is overcome by the collector's report in the case, because he states that the protest is valid and that he is ready to reliquidate the entry." In this connection it is also claimed that the merchandise is shown by the record to be the same as that covered by G. A. 7267, referred to by the appraiser. This claim of identity is founded upon the fact that in that case the board described the merchandise as "imitation sapphires, amethysts, and sardonyx, composed of glass or paste and intended for use as hatpin tops." We note here that the statement of the collector in the case at bar was that the protest was *partly* valid and that he was ready to reliquidate *if authorized* by the board.

It is contended by the Government that the reference to G. A. 7267 by the appraiser is not sufficient to show that the merchandise here is like or is entitled to the same classification as in that case, and, further, that the presumption obtains that the collector's classification is correct, anything contained in the record to the contrary notwithstanding.

In this connection the Government points out that, under articles 1072 and 1073 of the Customs Regulations of 1908, in connection with T. D. 29939, extending the application thereof to proceedings under the tariff act of 1909, the collector of customs not only had the right, but it was his duty, if satisfied that the importer's protest claim was a valid one, to reliquidate in accordance therewith. We understand said articles are in force and applicable to this case. Article 1072 is as follows:

ART. 1072. *Collector's review on protest.*—When an importer has paid all duties due in case of entry for consumption and has duly notified the collector of his dissatisfaction, the collector and the naval officer, if any, shall review his action upon the

entry, and if satisfied that the claim of the importer is a valid one shall reliquidate the entry in accordance therewith in conjunction with the naval officer, and shall send a statement of the facts to the Board of General Appraisers.

The applicable part of article 1073 is as follows:

ART. 1073. *Transmission to Board of General Appraisers.*—Unless the claim set forth in the protest is regarded by the collector, after reviewing his action with regard to the entry, as a valid one, he shall, within 30 days thereafter, transmit the protest, invoice, and all the papers and exhibits connected therewith to the Board of United States General Appraisers at 641 Washington Street, New York. * * *

Upon the coming in of the protest it was the duty of the collector to forward within 30 days the invoice and all the papers and exhibits connected therewith to the Board of General Appraisers, unless he determined that the protest was well founded and proceeded to reliquidate. At the expiration of the 30 days the collector, unless he acceded to the protest, was without further jurisdiction in the matter as to the classification and assessment of the merchandise, and jurisdiction over those issues had attached to the board whether the papers in the case had or had not actually been forwarded to the board. *United States v. Strauss* (5 Ct. Cust. Appls., 147; T. D. 34193).

Applying these rules to the facts here, it is clear that on and after July 1, 1911, the collector had no authority or jurisdiction over the questions raised by the protest, because the 30 days had elapsed from the filing of the protest with him and he had not acceded thereto; hence the only duty cast upon him was the administrative duty of forwarding the proper papers to the board. It is true that he did not perform this duty within the time required, but this delinquency on his part could not enlarge his authority. He could not in the interim, although he may have changed his mind respecting the classification of the merchandise or its duty rate, modify the decision he had already made on those questions, jurisdiction to determine the correctness of which was already vested in the board, nor could he by any act of his impeach or affect the presumed correctness of that decision, unless perhaps there was some claim of fraud, with which we are not concerned in this case. For his own information, he might talk with the appraiser about the case or refer it to him for further report after the expiration of the 30 days, but such action or anything resulting therefrom could not operate against the presumed correctness of his *decision* already made. It is the function of the collector to classify the merchandise and determine the rate and amount of duty. It is the function of the appraiser to determine its value, and we have held upon full consideration that when the appraiser has once made his appraisal and returned the same to the collector he is without authority to recall and change the same. *United States v. Bennett* (2 Ct. Cust. Appls., 249; T. D. 31975).

It is analogous at least to hold that the collector having once rendered his judgment upon the questions within his jurisdiction, and the time having elapsed within which he may lawfully revise the same, is likewise without authority then so to do. Nor is this all—the statute does not clothe the appraiser with any duty respecting the classification of the merchandise. His function relates to the ascertainment of its dutiable value, and although the customs regulations (see articles 1514 and 1515) require the appraiser, among other things, to describe the merchandise in such terms as will enable the collector to classify it for duty, yet this is by the express terms of the said regulations for the purpose of *assisting* the collector, and is not conclusive in any way upon his classification nor the correctness thereof. The collector may or may not classify according to the appraiser's description. In the case at bar it can make no difference how the appraiser has described the merchandise in his supplemental report to the collector, because at that time the collector was without jurisdiction to revise the judgment he had already rendered.

Under these circumstances we can not think, as is claimed by the importer, that this supplemental report of the appraiser should be held to deprive the collector's classification and assessment of the presumption of correctness which generally attaches thereto, nor to relieve the importer of the duty of proving that the claim made in his protest as to the proper classification of the merchandise was correct. It is not a case, as claimed by importer, where one of the parties has come into court and confessed judgment. At the most, if it were held to affect his prior decision, the collector's attitude as disclosed by his communication to the board is that the protest appears to be *partly* valid, but just what part is valid the collector does not say. Evidence would seem to be required to show, in view of the various claims made in the protest, just what claim is valid.

Although we are of opinion that the case may be disposed of on the grounds already mentioned, it should perhaps be added that we think the contention of the Government that the mere citation to a former decision of the board by the appraiser in his report to the collector is not sufficient to identify the merchandise in the instant case as being like that involved in the case cited is sound. Especially is this true of such a citation as is involved in this case, which is merely a reference to the cited authority without any statement on the part of the appraiser that the merchandise is identical.

The observations of this court by Martin, Judge, in *United States v. Eytinge* (4 Ct. Cust. Appls., 266; T. D. 33486) are pertinent here. In that case at the hearing before the board a witness was called by the importers who testified that the articles were similar in character to those involved in a former decision of the board. The

importers then introduced a copy of that decision and rested. There as here no samples of the merchandise were submitted. It was there said:

The importers did not offer the recorded testimony taken in the former case as evidence in the present case. * * * No sample of the merchandise was introduced in evidence nor was any sample retained by the appraiser. * * * The foregoing record certainly proves that the board's decision in the present case consistently follows the board's former decision in a similar case; but the record totally fails to disclose whether or not the former decision itself was sustained by the facts and the law of the case. The finding reported by the appraiser and the assessment made by the collector are presumed to be correct unless rebutted by sufficient evidence to the contrary. In the present record there is no evidence at all which contradicts the finding or the assessment. * * * It therefore becomes apparent that there was a total failure of evidence before the board in support of the protest, and in such case it is the duty of the court to permit the collector's assessment to govern the importation.

In the case at bar the appraiser's report of December 7, if it be conceded to possess evidentiary value, is simply that the merchandise is in imitation of precious stones, while the provision of paragraph 449, for the assessment under which the importer claims in this court, is for such stones "for use in the manufacture of jewelry." As to whether the importations here are for that use the record in the present case is entirely silent, while in the cited case the board found as a matter of fact that the merchandise there was in form adapted for no substantial use other than for jewelry and millinery ornaments and that they were intended for use as hatpin heads. To adopt that finding as applicable to the merchandise here is to indulge the presumption that hatpin heads made of glass are for use in the manufacture of jewelry without any evidence whatever as to the fact. It is said by the importer that hatpins with precious stones have again and again been held to be articles of jewelry, which may be granted, and it has also been held that other hatpins are not jewelry according as the facts may have appeared in each particular case. We find it unnecessary to enter into a discussion of this question or do more than refer to one case where the subject is considered. See *United States v. Flory* (4 Ct. Cust. Appls., 87; T. D. 33367).

We think the use can not be inferred, but must, unless conceded, be shown.

To avoid any misunderstanding of the scope of this decision, we take occasion to say that it is not intended hereby to impose any limitation upon the proper exercise by the collector of authority conferred upon him under the provisions of subsection 15 of section 28 of the act of 1909.

The judgment of the Board of General Appraisers is *affirmed*.

LEHMAN CO. v. UNITED STATES (No. 1354).¹

MEN'S COTTON GLOVES.

The provision of paragraph 328, tariff act of 1909, relating to knitted or woven gloves, is not limited in its application to gloves that are knitted, fashioned, and shaped wholly by a machine. *Spielmann & Co. v. United States* (3 Ct. Cust. Appls., 368; T. D. 32962) is controlling on the facts in this case.

United States Court of Customs Appeals, November 27, 1914.

APPEAL from Board of United States General Appraisers, Abstract 34530 (T. D. 34090).

[Affirmed.]

Jules Chopak, jr. (William L. Wemple of counsel), for appellant.

Bert Hanson, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, of counsel; *Martin T. Baldwin*, special attorney, on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

DE VRIES, Judge, delivered the opinion of the court:

The merchandise the subject of this appeal consists of men's cotton gloves, made of knitted cotton goods, shaped or cut, and sewn together. They were assessed for duty under the provisions of paragraph 328 of the tariff act of 1909, which, in so far as pertinent, reads:

328. Stockings, hose and half-hose, selvaged, fashioned, narrowed, or shaped wholly or in part by knitting machines or frames, or knit by hand, including such as are commercially known as seamless stockings, hose, and half-hose, * * *. Men's and boys' cotton gloves, knitted or woven, valued at not more than six dollars per dozen pairs, fifty cents per dozen pairs and forty per centum ad valorem; valued at more than six dollars per dozen pairs, fifty per centum ad valorem.

The appellant, who was the importer and protestant, claims them properly dutiable either under the provisions of paragraph 324 of said act as wearing apparel of every description composed of cotton or other vegetable fiber, or under the provisions of paragraph 332 as articles made from cotton cloth. The issues presented in this case and the merchandise the subject of consideration are precisely the same as in the case of *Spielmann & Co. v. United States* (3 Ct. Cust. Appls., 368; T. D. 32962). The testimony adduced at this trial and constituting this record does not undertake to establish commercial description. It seems to have been directed principally to the point of endeavoring to establish as a basis for judicial interpretation the absence from trade and commerce of gloves for men woven from cotton or other vegetable fiber.

The contention of the appellant here is, as it was in the case stated, that the provisions of paragraph 328 apply only to those knitted gloves the manufacture of which is completed upon knitting machines; that is to say, which are not only knitted but are fashioned and shaped wholly by a knitting machine or frame. In response to

¹ Reported in T. D. 34972 (27 Treas. Dec., 583).

the contention that there are no such commercial articles as men's woven gloves, nor a glove made of woven cotton cloth or other vegetable fiber, this record shows upon the testimony of the importer's witnesses the presence in trade and commerce of considerable quantities of such articles. They not only exist in the trade and commerce of this country, but have been imported from abroad. They are used by housemaids, by truckmen, and by gate tenders of railroads, as appears by this record.

In *Spielmann & Co. v. United States*, *supra*, this court said:

The phrase "cotton gloves, knitted or woven," is a broad and comprehensive term. All cotton gloves must be either knitted or woven, and it would seem that the intent of Congress is manifest to include within this one provision all cotton gloves. Such a thing as a woven cotton glove shaped by the process of weaving to fit the hand is unknown, and it is hardly conceivable that the term "knitted" is to be given a more limited signification when applied to gloves falling within its terms than the word "woven" used disjunctively in connection therewith.

An examination of paragraph 328 likewise discloses that when Congress was therein speaking of stockings made upon a knitting machine and wished to include only those which were fashioned and shaped wholly by a knitting machine it used language for that purpose precisely expressive thereof, speaking of them as "stockings, hose, and half-hose, selvedged, fashioned, narrowed, or shaped wholly or in part by knitting machines or frames." In the succeeding part of the paragraph, the part here in question, Congress did not use this limiting language, though speaking of knitted articles. The natural and forceful inference is that Congress did not here intend to include only those knitted gloves which were shaped and fashioned by knitting machines. The use of the word "woven" in connection with the word "knitted" gains additional force by this verbal relationship. Its use with the word "knitted," without the limiting language stated, goes far to evidence that Congress contemplated in this provision all those knitted gloves which could be made like woven gloves, and, therefore, classified the two together and surrounded each word with the same limiting language and no other. The contrary view renders idle and surplusage that language in the earlier provision. Moreover, as is pointed out in the *Spielmann* case, *supra*, there was a long continued and uniform and general customs practice, departmental and judicial, which gave to the words "knitted" and "knitting" a meaning which includes such merchandise as this as well as that completely fashioned and shaped by knitting machines. We find nothing in this record which would cause us to depart from the decision in the *Spielmann* case; on the contrary, the testimony herein and the reargument of the points involved confirm us in the correctness of the views expressed in that decision.

Affirmed.

ROGER & GALLET v. UNITED STATES (No. 1373).¹

1. PUBLICATIONS UNDER PARAGRAPH 517, TARIFF ACT OF 1909.

The term "publications" in paragraph 517, tariff act of 1909, must be held to apply to importations of the same general class or type as those mentioned in the preceding provisions of the paragraph.

2. ADVERTISING MATTER.

To admit purely advertising matter under that paragraph would extend the meaning beyond the fair import of the language employed.—*Schieffelin v. United States* (84 Fed., 880) distinguished.

United States Court of Customs Appeals, November 27, 1914.

APPEAL from Board of United States General Appraisers, Abstract 34934 (T. D. 34219).

[Affirmed.]

B. A. Levett for appellants.

Bert Hanson, Assistant Attorney General (*Henry H. Childers*, special attorney, on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

The merchandise in question consists of a pamphlet issued by the importers describing and advertising their perfumes, toilet water, etc. The articles were assessed for duty at 25 per cent ad valorem under paragraph 416 of the act of 1909, which imposes a duty of 25 per cent on "books of all kinds, bound or unbound, including blank books, slate books, and pamphlets, * * *." The importer claimed free entry under paragraph 517 of the act, which reads as follows:

* * * All hydrographic charts, and publications issued for their subscribers or exchanges by scientific and literary associations or academies, or publications of individuals for gratuitous private circulation, and public documents issued by foreign Governments.

The board overruled the protests and the importer appeals. Reliance is placed upon the cases of *Schieffelin v. United States* (84 Fed., 880); *United States v. Badische & Co.* (3 Ct. Cust. Appls., 528; T. D. 33170); *United States v. Gips* (4 Ct. Cust. Appls., 458; T. D. 33879).

It will be noted that in each of these cases the publications involved were printed books which contained matter of general information, one as to the uses of cod-liver oil, one as to the method of using dye-stuffs, and the third a fund of general information in regard to Holland. In each instance, however, the information conveyed by the book was accompanied by matter which was in the nature of advertising matter and supposed to benefit the publisher.

On the other hand, the court in *Matheson v. United States* (99 Fed., 261) held that samples of cloth goods arranged on cardboards with printed descriptions of the goods around the samples, and the boards folded into book form with short explanations at the beginning, for

¹ Reported in T. D. 34973 (27 Treas. Dec., 585).

gratuitous distribution, were not, in any proper sense, publications of books, maps, charts, etc., but rather exhibitions of samples for advertising purposes.

This case was followed by the board in T. D. 22143, in which the board distinguished the case of *Schieffelin v. United States*, *supra*, by saying that in that case the articles in question were books which, though intended for advertising purposes, contained some matter of scientific research original with the author and were not intended for general distribution, but for private circulation.

We think this case distinguishable from the cases relied upon by the importer in this, that the article in question is not, in the sense in which the term is employed in paragraph 517, a *publication*. The term "publications" should be held to be of the same general class or type as that mentioned in the preceding provisions of the paragraph. All of those mentioned are publications which are intended to convey some information of a general character. It is true that in the cases cited it has been held that such books, which contain matter of general interest, may still fall within the provisions of paragraph 517, other conditions being present, although they contain, in addition to such matter of general interest, advertising matter. We think, however, that to admit purely advertising matter under this paragraph would recognize an extension of its meaning beyond the fair import of the language, and would accord to the term "publications" a meaning not intended, as evinced by the connection in which it is employed.

The decision of the board is *affirmed*.

UNITED STATES *v.* SCHROCK & SQUIRES (No. 1374). UNITED STATES
v. RICHARD & Co. *et al.* (No. 1375).¹

COMBINATION OF OILS.

As to this merchandise, one of its constituents, petroleum, is an oil, but the other constituent differs physically, chemically, and commercially from the vegetable oil out of which it is made. It has become a sulphonated saponification of the original vegetable oil and a dissolution of petroleum in this does not constitute a combination of oils. It is a nonenumerated manufactured article and was dutiable as such at 20 per cent under paragraph 480, tariff act of 1909.

United States Court of Customs Appeals, November 27, 1914.

APPEAL from Board of United States General Appraisers, Abstract 34756 (T. D. 34186)
and Abstract 35155 (T. D. 34307).

[Affirmed.]

Bert Hanson, Assistant Attorney General (*Leland N. Wood*, special attorney, of counsel; *Charles D. Lawrence*, special attorney, on the brief), for the United States.
Comstock & Washburn, for appellees.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

¹ Reported in T. D. 34974 (27 Treas. Dec., 586).

MARTIN, Judge, delivered the opinion of the court:

The merchandise in this case was invoiced as "lubricating oil" and was imported under the tariff act of August 5, 1909.

The appraiser reported the article to be a "combination of oils," dutiable as such at the rate of 25 per cent ad valorem under paragraph 3 of the act. This rate of duty was accordingly assessed by the collector.

The importers protested against the assessment, claiming duty upon the merchandise as a nonenumerated manufactured article at the rate of 20 per cent ad valorem under paragraph 480 of the act.

The protest was submitted upon evidence to the Board of General Appraisers and was sustained. From that decision the Government now appeals.

The paragraphs which are thus called into question read as follows:

3. Alkalies, alkaloids, distilled oils, essential oils, expressed oils, rendered oils, and all combinations of the foregoing, and all chemical compounds, mixtures and salts, and all greases, not specially provided for in this section, twenty-five per centum ad valorem; chemical compounds, mixtures and salts containing alcohol or in the preparation of which alcohol is used, and not specially provided for in this section, fifty-five cents per pound, but in no case shall any of the foregoing pay less than twenty-five per centum ad valorem.

480. That there shall be levied, collected, and paid on the importation of all raw or unmanufactured articles, not enumerated or provided for in this section, a duty of ten per centum ad valorem, and on all articles manufactured, in whole or in part, not provided for in this section, a duty of twenty per centum ad valorem.

The first question, therefore, is whether the article at bar is a "combination" of oils within the terms of paragraph 3, *supra*. The testimony upon this subject seems to be free from substantial contradictions; therefore the facts may be stated with confidence.

The article in question is a dark-colored oily liquid which is used only in machine shops. It serves there as a lubricant for metal-cutting tools when operated in lathes to keep them from burning and spoiling the metal upon which they are acting. The liquid is a combination composed of two constituents. The first of these is simple petroleum, which constitutes about 80 per cent of its bulk and about 75 per cent of its value. The other constituent substance is a so-called "transformed" vegetable oil. The testimony does not disclose the identity of the vegetable oil in question, but the process of "transformation" which it undergoes prior to its combination with the petroleum is described with sufficient certainty. According to the testimony the vegetable oil in question is first sulphonated—that is, it is treated with sulphuric acid whereby a chemical change is produced, the hydrogen of the fatty acid being replaced by the radical of the sulphuric acid. The resulting product is then saponified, whereby further changes of form and substance take place. This final product, a sulphonated saponification of the original veg-

etable oil, is thereupon mixed with the petroleum in about the proportions above stated. This combination is the article now in question.

A chemical analysis of the present article discloses the presence also of some resin or resin oil, and the testimony does not specifically explain the origin of this. However, it may fairly be inferred that the resinous content existed in the constituent vegetable oil and was released in the process of sulphonation or saponification.

The foregoing facts seem to negative the claim that the present article should be classified as a "combination of oils." One of its constituents, petroleum, is undoubtedly an oil. The other constituent begins its relevant history as an oil, but it loses its character as such before it enters into combination with the petroleum. The substance which actually enters into that combination differs physically, chemically, and commercially from the vegetable oil from which it had its origin, and can no longer be classed as an oil of any kind.

The following extract from the testimony of N. J. Lane, the Government's chemist, supports the foregoing statement:

Q. Doctor, did you determine the character of the merchandise?—A. I did.

Q. What was it?—A. It was a sulphonated saponification of petroleum and other oils.

Q. How were they united or combined?—A. The petroleum is dissolved in a solution of soap made from sulphonated oil.

* * * * *

Q. You determined that it was a sulphonated saponification of oil and petroleum; is that right?—A. Yes; that is all.

It seems fair to conclude that "a solution of soap made from sulphonated oil" is not itself an oil, and that the dissolving of petroleum in such a material does not constitute a combination of oils within the purview of paragraph 3 in question.

This conclusion is not in conflict with the decision in the case of *Stone v. United States* (4 Ct. Cust. Appls., 47; T. D. 33266), for the oil involved in that case had not been sulphonated or saponified before its importation, although one of the questions incidentally raised in the case related to its saponifiable content. It need hardly be said that the issue presented in that case had nothing at all in common with the present question.

The present article, therefore, is a nonenumerated manufactured article, and is composed of several materials of which petroleum is the component material of chief value. Under paragraph 639 of the tariff act of 1909 petroleum was placed upon the free list. This fact brings into application the rule enunciated in the following terms by the Supreme Court in the case of *Hartranft v. Sheppard* (125 U. S., 337):

Quilts are nonenumerated manufactured articles composed of two or more materials. Eider down is on the free list. As eider down is the component material of

chief value in the quilts involved in this suit, and that is free, it follows that they are manufactured articles not provided for, and therefore chargeable with the duty of twenty per cent ad valorem under section 2513, rather than thirty-five per cent as a manufacture of cotton, or fifty per cent as a manufacture of which silk is the component material of chief value.

This rule, under the facts above stated, requires the assessment of the present importation at the rate of 20 per cent ad valorem as a nonenumerated manufactured article under the provisions of paragraph 480 of the act. See also *Strakosh v. United States* (1 Ct. Cust. Appls., 360, 361; T. D. 31453).

Merchandise identical in character with the present article was before the board and the court in the following cases, viz, in the *Strakosh* case, Abstract 21483 (T. D. 29877), where its assessment as "alizarin assistant" under the tariff act of 1897 was held by the board to be erroneous, but where no relief was due the protestants because of the want of a proper protest and record; in the *Strakosh* case, Abstract 28570 (T. D. 32560), where its assessment as "alizarin assistant" under the tariff act of 1897 was reversed by the board, and it was held to be dutiable as a nonenumerated manufactured article; in the *Richard & Co. case*, Abstract 31033 (T. D. 33088), where the decision next foregoing was approved and followed under the tariff act of 1909; and in the case of *Strakosh v. United States* (1 Ct. Cust. Appls., 360; T. D. 31453), where an assessment of the article as "alizarin assistant" under the tariff act of 1909 was in question, but was not decided upon the merits because of the fact that no proof appeared in the record in support of the importers' claim that petroleum was the component material of chief value in the article.

It therefore appears that the issues presented in the foregoing cases were not identical with that now before the court, nevertheless the conclusions therein announced were entirely consistent with that reached in the present case.

In accordance with the views above expressed the decision of the board is *affirmed*.

BATTEN & Co. *v.* UNITED STATES (No. 1378).¹

1. DURESS.

The importer may, in view of possible subsequent proceedings, register with his entry his claim as to the true valuation, and for the collector to refuse this privilege might be duress. But to constitute duress the proof must show a substantial right had been denied.

2. *IBID.*

In the case here there is no evidence that the goods are ever sold in the open markets of the country of exportation at less than the price including the com-

¹ Reported in T. D. 34975 (27 Treas. Dec., 580).

mission in controversy, and the requirement that this should be added to make market value was not to deprive the importer of any substantial right. The requirement, accordingly, did not constitute duress.

United States Court of Customs Appeals, November 27, 1914.

APPEAL from Board of United States General Appraisers, Abstract 34856 (T. D. 34201).

[Affirmed.]

Allan R. Brown for appellants.

Bert Hanson, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, of counsel), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, AND MARTIN, Judges.

DE VRIES, Judge, delivered the opinion of the court:

Appellants for many years have been importers of certain woolen, worsted, and other dress goods at the port of New York from Bradford, England. Their appeal here concerns certain alleged commissions claimed to have been paid by the New York firm to so-called brokers in this class of goods in the country of exportation. The evidentiary facts in the case disclose that the goods were purchased from these so-called brokers, but could not be bought from the manufacturers or others. The issue principally argued at the hearing and in the briefs is a claimed duress exercised by the collector requiring the importers to make their entry in a prescribed form. It appears that in the early stages of the controversy the importers through their broker appeared at the customhouse with their entry, noted upon which were the words "add 2½ per cent commission." This entry was rejected by the collector's office and was thrown out into what is known as the entry error box. Thereupon the matter was taken up with the chief clerk of the entry division of the customhouse, who advised the importers through their broker that such entries would not be accepted; that the only entry that would be accepted would be in substance "add 2½ per cent to make market value." Thereupon and thereafter the importers followed the course thus directed by the chief clerk of the entry division at the customhouse. While there may be natural minor differences as to the precise occurrences and language used, there is no question in the mind of the court that the record fairly discloses that the importers in good faith endeavored to inscribe upon their entry the words "add 2½ per cent commission" for the purpose of, as they supposed, saving their rights in future proceedings, and that the said clerk refused to accept such entries and accepted only those written as he directed.

If this were the only controlling issue in the case we would be inclined to hold that, within the previous decisions of this and the Supreme Court of the United States, this action upon the part of the collector constituted duress as to the controlled action of the import-

ers. What constitutes duress upon behalf of public officials has been so thoroughly discussed by this and the Supreme Court that it needs here no extended elaboration.

The facts of this case in the particulars relating to the transactions of the respective parties at the customhouse are almost identical with the facts in *Stein v. United States* (1 Ct. Cust. Appls., 36; T. D. 31007; 1 Ct. Cust. Appls., 478; T. D. 31525). The Supreme Court of the United States in *Robertson v. Frank Bros. Co.* (132 U. S., 17), speaking to the subject of what constitutes duress in such cases upon the part of a public official, said:

In our judgment the payment of money to an official, as in the present case, to avoid an onerous penalty, though the imposition of that penalty might have been illegal, was sufficient to make the payment an involuntary one. It is true that the thing done under compulsion in this case was the insertion of the additional charges upon the entries and invoice; but that necessarily involved the payment of the increased duties caused thereby, and in effect amounts to the same thing as an involuntary payment.

In an earlier case, *Maxwell v. Griswold et al.* (51 U. S., 10 Howard, 241), which also related to controlled actions of an importer in making an entry, took the same position.

This court in *Van Ingen & Co. v. United States* (4 Ct. Cust. Appls., 320; T. D. 33520), epitomized the doctrine of duress in such cases in the following language:

Had the collector forced the importers to include in their entry admissions which they did not desire to make, or had he refused to receive their entry unless they excluded from it declarations which they deemed it proper to include for their protection in case of dispute as to the duties imposed, some claim of duress might have been made within the reasoning of *Stein v. United States* (1 Ct. Cust. Appls., 36; T. D. 31007), and of *Stein v. United States* (1 Ct. Cust. Appls., 478; T. D. 31525). Such conduct on the part of the collector might amount to an illegal exaction under color of official authority, and as possession of the goods was dependent on compliance, duress might well be asserted.

The language in *N. Erlanger, Blumgart & Co. v. United States* (154 Fed., 949) is in principle here applicable. The court there said:

The appraisers can not include in their valuation some improper item, such as ocean freights from the foreign country to the United States, and cut off all inquiry as to their action by merely inscribing on the entry a statement that they added the item "to make market value."

So here the collector had no right to so control the action of the importers in making their entry that the importers could not there register their supposed rights in a manner that would enable them to avail themselves thereof in subsequent proceedings. If the importers wished in a reasonable way to record upon their entry the character of an item included thereupon that its nature might more plainly appear, or, particularly, that it might be so noted that they would not thereby be precluded from afterwards showing its true character, or would not thereafter be precluded by the law from

insisting that it was not a dutiable item or not a part of market value, we can not conceive of the validity of any action or regulation which would deny them absolutely this right. It follows that where the collector, however actuated, refuses to the importers that privilege, at least in a reasonable manner as was here attempted, such refusal upon the part of the collector within the decisions quoted would amount to duress. The existence of such duress, however, will not entitle the importer to relief unless it is shown by the record that in the last analysis it deprived him of some substantial right. Such does not here appear to have been the case.

Primarily this record does not satisfactorily make clear that the commission here claimed was a nondutiable one, at least in its entirety. Herein this case differs from the Stein case, *supra*. In that case the board made a finding "that the services rendered by the commissionaire, which were assumed to be paid by the 2½ per cent, were the legitimate services of the commissionaire, and the payment for same was commissions, which were not dutiable." This finding was accepted by the court as true for the purposes of those cases.

The facts as related by Mr. Batten of the importing firm may be delineated by the following excerpts from his testimony:

Q. Are you familiar with the nature of this 2½ per cent commission that was put on these?—A. I am, perfectly.

Q. For what service was that 2½ per cent paid? (Objected to as immaterial and irrelevant; objection overruled; exception.)—A. That we paid to the commission house in Bradford for the execution of our business, order the goods, examine the goods to see that they were right. We had no means of telling whether before we paid the duties and got them in our store whether they were all right, but *we were obliged to buy the goods through the commission houses and these commission houses charged us this commission for that service alone.*

Q. They placed the order for the goods for you with the manufacturer?—A. Yes, sir.

Q. After placing the order what do they do?—A. They place it with the manufacturer, get the goods in the gray, then place them with the dyer and finisher, then examine the goods very carefully to see that they are all right, and if they are not right they reject them; and for that they charge us 2½ per cent commission.

Q. I understood you to say in the course of your remarks that you were obliged to buy your goods through the commission house. Is that right?—A. That is correct, because *I could not buy direct from the manufacturers.*

Q. There is no choice to you but to buy them in this way through the commission house?—A. No other way I could get my goods.

Q. At the time you bought them through this commission house I suppose you gave them this compensation of 2½ per cent for their trouble and time as you have stated?—A. Yes, sir.

Q. How long has that been true to your knowledge, Mr. Batten?—A. Well, for twenty-odd years and over.

(By Judge WAITE.) Q. You say your agents get them in the gray from the manufacturer and then take them to the dyer and he dyes and finishes them and brings them to you in pieces folded up, does he?—A. Yes.

Q. And your agent examines them, throws them over a line and examines them, marks the defects, then rolls them up again and packs them? Does this 2½ per cent pay for the services?—A. No, sir; that is all included in the first cost of the goods to us. There is a 2½ per cent extra commission.

Q. All these things I have mentioned can not be from the manufacturer, because he is a different man than the man that dyes the goods?—A. The man who I buy the goods of has the price of the manufacturer in the gray cloth and also the dyeing price and all other costs, what it cost, the piece of goods made up.

Q. Is that the man you pay the commission to?—A. That is the man.

Q. That sells them to you?—A. Yes; that is the man.

Q. The same man you pay the commission to is the man from whom you buy the goods?—A. Yes; we did on those.

Q. We are talking about what you paid at that time?—A. Exactly.

Q. You knew the condition at that time?—A. Yes; when I was in business for myself.

(By Mr. ROBERTSON.) Q. The same person you paid the 2½ per cent to is the person from whom you bought the goods?—A. Absolutely.

(By Mr. STRAUSS.) Q. You bought the goods in their finished condition at a fixed price and you paid him the 2½ per cent for the examination in addition?—A. Yes; the price includes all made up ready for shipment.

It is not exactly clear from the record that the commission does not include the service of supervision of the dyeing at least. In this respect the record is unsatisfactory. The goods are taken in hand by the commissionaire in the gray, by him taken to the dyer and there dyed, presumably according to his instructions and specifications and subject to his approval. This suggestion, however, is made more in the nature of a query which could only be satisfied by a more definite exposition of the facts by the record.

It does here appear, however, conclusively that these goods can not be purchased other than of the commissionaires, that they can not be purchased of the manufacturers, that they can not be purchased at a price less than that paid these commissionaires including the commission. This is the only evidence in the record as to the actual market value of these importations in the country of exportation. There is at least no evidence before us showing that the goods are ever sold in the open markets of the country of exportation at less than the price including this commission.

Actual market value is defined by the several provisions of the customs administrative law and the decisions of the Supreme Court of the United States to be "the price at which the merchandise is freely offered for sale to *all purchasers* in the particular markets of the country of exportation in the usual wholesale quantities, the price which the manufacturer or owner would have received, and was willing to receive, for such merchandise when sold in the ordinary course of trade in the usual wholesale quantities." The evidence in this record discloses that the only price at which these goods could be purchased by all comers, the only price at which they were freely

offered for sale in the usual wholesale quantities in the markets of the country of exportation, was and is the price paid by these importers to the commissionaires, including the $2\frac{1}{2}$ per cent commission. It would seem, therefore, conclusively established for the purposes of this case that the claimed $2\frac{1}{2}$ per cent commission was not a nondutiable item of commission but was in fact a part of the actual market value of the goods.

A very similar case as to the facts and the applicable law was that decided by the United States Circuit Court of Appeals, Second Circuit, in *United States v. Herrman et al.* (91 Fed., 116). The facts and conclusions of the court are epitomized in the syllabus as follows:

The evidence showed that manufacturers were accustomed to sell in a foreign market to others than commission men at a fixed price, including in the price an item which they called "commission." The item so charged was the discount which the manufacturers were accustomed to allow commission merchants who purchased direct from them. There was evidence that, in buying goods of a concern which was a manufacturer and also a commission house, the price of the goods purchased of them was the same as for those of their own manufacture and for similar goods manufactured by others which they were selling on commission. *Held*, that the customhouse officers, in appraising the goods, should properly include as a part of the actual manufacturing price the entire sum paid by the importers to the commission men or the manufacturers, no part of which was properly chargeable as a commission.

The principle of law invoked, as stated with approval by the court, in support of the claim of the nondutiability of such commissions was as follows:

A commission paid by the importer to his agent for services in procuring, forwarding, or caring for the goods is an item quite independent of the wholesale price of the goods at the market where they were bought. It may, and generally does, constitute an element of the cost of the goods to the importer; and, in exceptional cases, may of the market value. *Muser v. Magone* (155 U. S. 240; 15 Sup. Ct., 77).

It seems in that case, as is really the fact in this, the claim was made for a commission for a man selling his own goods. The commissionaires in that case were allowed by the manufacturers 5 per cent and the board had allowed them $2\frac{1}{2}$ per cent. After discussing the principles of actual market value and wholesale price and nondutiable commissions in a careful and well-studied opinion the court concluded:

It is not a violent presumption that the price actually paid by the importer to those of whom he buys goods in a foreign market, the price which he is willing to pay and freely pays, is the average market price, and not one 5 per cent higher; and if the appraisers, instead of adding to the invoice price $2\frac{1}{2}$ per cent as an item "improperly deducted as commission," had added 5 per cent, they would have been quite justified in doing so by the evidence. The evidence before the Board of General Appraisers impresses us with the conviction that the item of "commissions," so called, is not entitled to cut any figure in the case, except as a trade device to mislead the customs officers and be made the basis of a claim for a reduction from the real wholesale price.

We are of the opinion, therefore, on the facts here, that while in a proper case the actions of the collector might have resulted in a

deprivation of the substantial rights or privileges of the importer and have amounted to remediable duress, in this case, irrespective of whether or not there was duress, the importers have suffered no substantial or other deprivation of rights.

Affirmed.

WRIGHT & GRAHAM CO. v. UNITED STATES (No. 1417).¹

PARAGRAPH 627, TARIFF ACT OF 1913.

Reviewing the history of the legislation affecting containers, such as the immediate coverings of tea in this case, and the larger holders or boxes carrying the packages of tea, it is held that the larger containers used in the shipment and transportation of tea put up and imported in packages less than 5 pounds each should be taxed under paragraph 627, tariff act of 1913, but the immediate coverings or wrappers, constituting a part of the packages, are free of duty.

United States Court of Customs Appeals, November 27, 1914.

APPEAL from Board of United States General Appraisers, G. A. 7567 (T. D. 34467).

[Reversed.]

McLaughlin, Russell, Coe & Sprague (Edmund P. Sharretts of counsel) for appellant.
Bert Hanson, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, of counsel), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

BARBER, Judge, delivered the opinion of the court:

Paragraph 627 of the tariff act of October 3, 1913, and which is one of the free list paragraphs of the act, contains the following:

Tea, not specially provided for in this section, and tea plants: *Provided*, That the cans, boxes, or other containers of tea packed in packages of less than five pounds each shall be dutiable at the rate chargeable thereon if imported empty; * * *.

Subject to these provisions, tea in packages of less than 5 pounds, that is, packages containing 1½ to 4 ounces of tea each, were imported. The immediate containers, holders, or coverings of the tea were either sheet lead, cardboard boxes, or boxes with cardboard sides and tin tops and bottoms. So constituted, these packages of tea were packed in larger tin boxes holding more than 5 pounds. These larger tin boxes are substantially made, are capable of being used and are used as containers after the package teas are removed therefrom, and according to the undisputed testimony of one witness are sometimes of more value than the packages of tea contained therein. When package teas are imported in these large tin boxes such boxes are covered with wooden boxes or crates.

The evidence shows that these cardboard or cardboard and tin boxes are of no appreciable value after the tea has been removed therefrom and generally are thrown away. It also tends to show that the lead covering is likewise of no value and if imported separately

¹ Reported in T. D. 34976 (27 Treas. Dec., 595).

would be in the form of sheets because of its physical inability to maintain the shape of a container unless filled. The tea, of course, was admitted free, but duty was assessed upon these immediate containers, holders, or coverings according to the appropriate rates therefor elsewhere provided in the act, and no duty was assessed upon the larger tin boxes in which the packages were imported. This assessment was sustained by the Board of General Appraisers.

The single question here is whether under the provisions of paragraph 627 duty was properly assessed upon these immediate containers, holders, or coverings.

The testimony of record shows that loose tea is imported in various kinds of containers, in quantities of more than 5 pounds, and that package teas seldom contain more than 1 pound of tea in a package and never more than 5 pounds.

Confessedly the language of the paragraph is not free from ambiguity. It provides for duty on some cans, boxes, or other containers of tea, but it is not clear whether such dutiable articles are the immediate containers or coverings of the tea, which with their contents constitute a package of tea, or are the larger cans, boxes, or containers in which such packages are placed prior to shipment and importation.

Prior to the tariff act of 1909, there had been considerable controversy between the Government and importers as to the dutiability of certain articles used as containers, generally of tea, which were often of such stable construction and of such ornamentation and value that it gave rise to the claim that, under the recognized rule that free goods meant free containers (tea not being dutiable), articles unusual in form or designed for uses other than in the bona fide transportation of merchandise were obtaining free entry into this country. T. D. 12564, T. D. 29801, T. D. 29369, Abstract 21393 (T. D. 29834).

During the consideration of the subject matter of the proposed tariff bill of 1909, representations were made on behalf of some manufacturers of tin boxes, cans, and containers that they were inadequately protected, and certain specific and ad valorem taxes on such articles were asked for. See Tariff Hearings, 1908-1909 (vol. 8, p. 8030).

The tariff act of August 5, 1909, contained the following paragraph:

195. Cans, boxes, packages, and other containers of all kinds (except such as are hermetically sealed by soldering or otherwise), composed wholly or in chief value of metal lacquered or printed by any process of lithography whatever, if filled or unfilled, and whether their contents be dutiable or free, four cents per pound and thirty-five per centum ad valorem: *Provided*, That none of the foregoing articles shall pay a less rate of duty than fifty-five per centum ad valorem; but no cans, boxes, packages, or containers of any kind, of the capacity of five pounds or under, subject to duty under this paragraph, shall pay less duty than if the same were imported empty; * * *. *Provided further*, That paper, cardboard or pasteboard wrappings or containers that are made and used only for the purpose of holding or containing the article with which

they are filled, and after such use are mere waste material, shall not be dutiable unless their contents are dutiable.

Much litigation arose under this paragraph, which seems to have been the first enactment of its kind, and there ensued rulings of the Treasury Department and many decisions of the Board of General Appraisers construing and applying it. Tea containers seem to have been a favorite subject of this litigation. T. D. 31072, Abstract 24965 (T. D. 31352), and Abstract 31364 (T. D. 33217) may be referred to. Many other decisions upon this much mooted question may be found by a reference to the subject of "tea coverings" in the indexes to the several volumes of the Treasury Decisions covering the period during which this paragraph was in force. These decisions, so far as reported in the Treasury Decisions, do not generally mention the capacity of the various containers under consideration, but indicate that relatively quite valuable containers were admitted to free entry either as usual containers or as being hermetically sealed.

This brings us to the tariff law of 1913, known as the Underwood Act.

The Ways and Means Committee gave hearings on tariff questions before the Underwood bill was introduced in the House and had in mind tariff information obtained by it in preceding years, as far back as prior to the tariff act of 1909. Its attention was also specifically called to litigation touching the subject of tea containers under paragraph 195. Claim was made to the committee that, as that paragraph had been construed and applied, tea merchants of the United States had been discriminated against, in that they could not profitably import loose tea and put up and sell the same in packages of less than 5 pounds in competition with importers of package teas of that weight, because of the greater cost of manufacturing the immediate containers or coverings of such teas in this country and the greater expense of labor in packing the tea therein. In that connection the committee was urged to omit paragraph 195 from the forthcoming bill and to substitute in lieu thereof a paragraph providing for duty upon "cans, boxes, packages, and other containers of imported tea of a capacity of 5 pounds or under, of whatever material composed," or as a paragraph not limited to tea containers the following: "Cans, boxes, packages, and other containers of imported merchandise of a capacity of 5 pounds or under, of whatever material composed."

On behalf, evidently, of certain importers of tea in packages the committee was urged to repeal altogether paragraph 195, and in support of this contention it was said that its operation had been highly discriminatory and unjust; that all the legislation relating to containers of imported merchandise that was fairly required was to be found in subsection 18 of section 28 of the act of 1909, which in passing, it may be noted, is practically identical with sub-

section R of section 3 of the act of 1913. The provisions referred to in these statutes are, in substance, that any unusual article or form of covering or container (whether of free or dutiable merchandise), if designed for use otherwise than in the bona fide transportation of such merchandise, shall be dutiable at the rate to which it would be subjected if separately imported. It was also claimed that to retain or place a duty on containers of food products would necessarily raise the price to the consumer or deprive him of a suitable container in which to keep or preserve the same until used; that such a duty, so far as it related to the immediate containers of package teas, would not benefit the consumer, but would enable the American tea packer to charge more for such teas; and finally that under the provisions of the act of 1909 the domestic can was the cheapest in the American market and controlled it.

Other interests urged the committee to impose a small duty on all imported teas and also "an additional duty of 5 cents per pound on all teas imported into the United States packed in any description of container containing less than 5 pounds." It was represented that a small duty on all imported teas in packages of 5 pounds or under would allow tea packers in America to compete with foreign-packed teas.

As introduced into the House, the Underwood tariff bill contained the following free-entry paragraph:

630. Tea and tea plants: *Provided*, That cans, boxes, or other containers of tea packed in packages of less than 5 pounds each shall be dutiable at the rate chargeable thereon if imported empty. * * *

When this bill came to the Senate some of the considerations hereinbefore mentioned were presented to the Subcommittee on Finance and it was urged that the first line of this paragraph be amended to read, "tea imported direct from the country of origin and tea plants," etc., leaving the remainder of the paragraph unchanged.

The proceedings from which this resumé is made may be found in the report of the Ways and Means Committee to the first session of the Sixty-third Congress, accompanying H. R. 3321, at page II, and pages 1909 *et seq.* of volume 2, and page 6047 of volume 6 of the Hearings on Tariff Schedules before the Ways and Means Committee of the Sixty-second Congress, and at pages 315 *et seq.* of the volume embodying the Report on Tariff Hearings before the Subcommittee on Finance of the Senate to the same Congress.

These proceedings show, what doubtless would be presumed were they not referred to, that Congress and its committees had proper cognizance of the history of the whole subject matter, knew the various reasons for the repeal of paragraph 195 of the act of 1909, and the divergent claims of persons interested in the action to be taken with reference to tea and the containers thereof, whether in

package form or otherwise. No general substitute for paragraph 195 appears in the Underwood Act.

As to the actual purpose or intent of Congress in the enactment of paragraph 627 we know nothing except what the language thereof imports. This is to be construed, however, in the light of the history of the subject of tea containers hereinbefore set forth and what has been outlined as to the congressional proceedings touching the paragraph itself.

As enacted it is susceptible either of the construction claimed by the Government, namely, that the immediate wrappings or containers of less than 5 pounds of tea are dutiable, or of that of the importers, which is that thereunder duty is to be levied only upon the larger containers of *packages* of tea of less than 5 pounds, the immediate containers or coverings of which are free. And it is not entirely clear, considering alone the language of the paragraph, that it might not be understood to impose a duty upon both classes of these containers or coverings, although in view of what has already appeared we do not now consider this construction to be tenable.

As we have said, the immediate containers or coverings involved in this case have a capacity of, or in fact contain, from 1½ to 4 ounces of tea each. They are not expensive, are not especially durable or substantial in their construction, and after the contents have been consumed are of no value as articles of merchandise, although the boxes may have some further use as containers. The larger tin boxes have a capacity of more than 5 pounds, are substantial in construction, durable, have considerable value, and manifestly are capable of being used as containers long after the teas imported therein have ordinarily been consumed.

It must be confessed that at first blush it seems much more probable that Congress would naturally undertake to levy a duty upon the latter rather than the former. This natural probability is strengthened by the fact that apt language to effect the Government's contention was, as already appears, submitted to the Ways and Means Committee and rejected by it. Further support for this view is found in the fact that when legislating with respect to packages somewhat similar to these packages of tea, Congress has, when some special regard was to be had to the immediate coverings thereof, used the word "immediate" when referring thereto. See paragraphs 180, 199, 203, 209, 228, and 229 of the act of 1913.

We think this indicates a congressional recognition of what we are clear is the fact, namely, that in common understanding the word "package" necessarily implies a wrapper, covering, or container of some kind and many times is used to include the same as well as the commodity thereby held or contained. Such expressions as "packages of soap," "packages of candy," and "packages of pencils," are but common illustrations of this fact, and we doubt not "a package

of tea" is equally common and appropriate. Then too, this construction avoids the seeming incongruity of holding that a flat lead sheet is a container. It also assumes that when Congress substituted, so far as teas are concerned, paragraph 627 for paragraph 195 of the act of 1909, in the first line of which the word "packages" was employed in association with cans and boxes as containers, it intended by omitting the word "packages" from 627 to indicate that the provision for "cans, boxes, and other containers" in that paragraph was not intended to include packages in the class of containers there referred to.

For these reasons and after much consideration we conclude that Congress intended to declare in paragraph 627 that the larger containers used in the shipment and transportation of tea put up and imported in packages of less than five pounds each should be taxed and not the immediate coverings, wrappings, or containers which constitute a part of the packages. It is not claimed that the smaller boxes or lead sheets in this case are unusual containers or coverings or designed for use otherwise than in the bona fide transportation of the merchandise.

The Government's claim that it was the intent of Congress to afford some measure of protection to the tea packers of this country is satisfied by this interpretation. The only difference is that we give effect to this intent by a tax upon the larger and more durable, useful, and valuable containers instead of upon those that are small, unsubstantial, and of no commercial value. Congress may well have recognized the soundness of the claim that, at least when free goods are considered, such immediate containers thereof as are before us should be given free entry and the consumers be thereby permitted to obtain without tax thereon a suitable holder or container of the merchandise in which to keep it until used and as an incident to the character of the commodity. Again this construction would seem to result in a greater uniformity of cost in the prices to the consumers of these package teas, because, instead of resulting in varying prices of the packages according to the duty upon the *immediate* containers or wrappings, which then would become the unit of taxation, logically, at least, a duty upon the larger containers would be distributed pro rata upon the packages contained by them, resulting in equality of cost of the package teas in any given container, which would not happen if there were packed in any given container packages whose immediate coverings or wrappers were subjected to different rates of duty.

The conclusion we reach renders it unnecessary to consider or dispose of any other questions raised by the record.

The judgment of the Board of General Appraisers is *reversed* and cause remanded with direction that reliquidation be had in accordance with the views herein expressed.

AMERICAN BEAD CO. v. UNITED STATES (No. 1341).¹

WHERE TWO OR MORE RATES OF DUTY ARE APPLICABLE.

The present merchandise before and at the time of the passage of the tariff act of 1909 was known commercially as beads and known also commercially as agate button blanks, and under the testimony it can not be well said that either designation is the more specific. Accordingly, the articles fall within the final clause of paragraph 481 of the act in question, by which they must take the higher rate of duty assessed upon the two classifications.

United States Court of Customs Appeals, December 14, 1914.

APPEAL from Board of United States General Appraisers, Abstract 34844 (T. D. 34201).

[Affirmed.]

Allan R. Brown for appellant.

Bert Hanson, Assistant Attorney General (*Charles D. Lawrence*, special attorney, of counsel), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MARTIN, Judge, delivered the opinion of the court:

The merchandise consists of small rounded disks of commercial agate, white in color, and pierced with a single hole through the center. They were invoiced by the importers as agate beads.

The appraiser reported the articles to be parts of agate buttons, and returned the same for duty as such under paragraph 427 of the tariff act of 1909. They were accordingly assessed with duty under that paragraph.

The importers protested against the assessment, contending that the merchandise was beads and therefore dutiable under the *eo nomine* provision for beads of all kinds contained in paragraph 421 of the same act.

This issue was tried upon evidence before the Board of General Appraisers and the board overruled the protest. The importers now prosecute their appeal from that decision.

The following is a copy of the pertinent parts of the two paragraphs thus relied upon by the respective parties:

421. Beads and spangles of all kinds, including imitation pearl beads, not threaded or strung, or strung loosely on thread for facility in transportation only, thirty-five per centum ad valorem; * * *

427. Buttons or parts of buttons and button molds or blanks, finished or unfinished, shall pay duty at the following rates, the line-button measure being one-fortieth of one inch, namely: Buttons known commercially as agate buttons, * * * one-twelfth of one cent per line per gross; * * * and in addition thereto, on all the foregoing articles in this paragraph, fifteen per centum ad valorem; * * *.

The issue therefore is whether the importations were dutiable as beads under paragraph 421 or as parts of agate buttons under paragraph 427, both above copied.

It convincingly appears from the testimony that the present articles are simply certain sizes of similar articles made in many differ-

¹ Reported in T. D. 35001 (27 Treas. Dec., 656).

ent sizes, all of which had been the subjects of importations into this country for more than 30 years next preceding the tariff revision of 1909. During all but the last few years of that period the merchandise figured exclusively in the bead trade, being imported by bead houses only and being known commercially as agate beads. In use the articles were strung upon ornamental strands, either alone or together with beads of other colors and materials. Such strands were cheap in character, generally selling for 5 or 10 cents apiece in the retail trade.

A few years prior to the tariff revision of 1909 a new use was found for the articles, which speedily became their chief use. By chance it was observed by a button manufacturer that in point of size and form these articles resembled certain button blanks made of pearl, ivory, glass, or other materials, and used as bodies in the manufacture of shanked buttons. Such button blanks were rounded disks like these with single perforations, through which metal shanks could be twisted by machinery, thus converting them into completed buttons. Upon experiment it was found that the present articles were susceptible of the same use by means of the same machinery, thus affording a cheap and suitable body for the manufacture of such buttons. Nor did this appear to be an abnormal or irregular use of the articles in question, for they were exactly suitable therefor in point of size, shape, material, and cost of production. And they were similar in size and shape to button blanks made of other substances for similar use in the manufacture of shanked buttons. Such buttons are largely used as shoe buttons. They are also sewed upon certain kinds of garments, and when made with agate bodies they are of course known commercially as agate buttons. They are also made into sleeve and collar links, composed of two buttons held together by metal links.

The history of this development is told by the importers' witness, Harry S. Neumann, whose testimony upon that subject is here copied. The date of his examination as a witness was December 1, 1913. According to his statement the transactions of which he speaks began about seven years before that time, or about the close of 1906, being more than two years before the enactment of the tariff act of 1909.

Q. Are you familiar with the merchandise the subject of this hearing?—A. Yes, sir.

Q. You, I believe, testified that you bought these articles and used them largely in the manufacture of fancy buttons?—A. Yes, sir.

Q. How long is it since you first found that these articles were capable of being used by you in the manufacture of buttons?—A. I should say about seven years.

Q. At that time what was there—a machine developed, or what—that enabled you to make buttons out of these articles?—A. A demand sprang up for a shoe button. We were making them in pearl and we found them rather expensive. The trade wanted something cheaper. I happened to walk by the American Bead Co.'s window

on Broadway and saw agate beads in the window. I went into the American Bead Co., whom I had never known before, and asked to see some of those samples. They showed me samples. I took the beads and we went to the factory and took those beads and put them in the same machine that we have to make pearl buttons with a revolving shank on, and they worked satisfactorily.

Q. At that time that you devoted yourself to getting beads for this use, did you not notice at all what the finish on the one side was, whether they were equally finished on both sides, or whether one was rough?—A. One was always rough, because we put the rivets through the well finished side. In other words, the rough was the back.

Q. And these beads bought from the American Bead Co. were bought out of stock?—A. We bought samples out of stock. They only carried a limited quantity.

Q. Subsequent to your development of this use for the article, did you buy from other people? Did you see other people who were the manufacturers of these to see whether the demand for your raw material could be filled?—A. Yes; after buying from the American Bead Co. I went to Europe to one of the syndicates that makes these goods in Austria and I went to Germany and bought them from another manufacturer. We also bought them in France.

Q. How many manufacturers are there of these agate beads in the world that you know of?—A. To my knowledge there are five manufacturers.

Q. And have you bought these articles from all five of them?—A. Well, only four of them make this special class of goods, but we have bought them, I believe, of every one of them.

Q. Have you had samples submitted to you before purchase of their regular agate beads?—A. Well, we simply buy them according to the special sizes.

Q. Before buying, you see their product?—A. Yes, sir.

Q. Were those samples thus submitted finished on both sides or have they all this same defect of having one side finished and one rough side?—A. Always the same; always the same traces of being rough on one side.

Q. Do you know why that peculiarity of having one rough side and one finished side exists in the case of agate beads?—A. I can not tell you exactly why, because it is a secret process of these factories, but I have always noticed that to be the case in these agate beads.

Q. That has been the practice how long?—A. Ever since I have been handling the goods.

Q. For seven years?—A. For seven years.

Q. (By General Appraiser SULLIVAN.) Could they be used as beads or buttons, either one?—A. Of course we have used these things largely as buttons.

Q. (By General Appraiser McCLELLAND.) You have never been in the bead business?—A. No; simply for buttons.

Q. You have no idea of what is the most specific use, making beads or buttons?—A. Well, they make mostly beads of course, because all the other trades use a great number of these, but I am not in the bead business.

By Mr. LAWRENCE. Q. During the seven years you have handled these agate articles you have used them exclusively in the button trade?—A. Well, we have made various articles out of them, for collar bars and things like that [indicating].

Mr. STRAUSS. The court won't know what you are referring to.

The WITNESS. I will say we have used these things as buttons chiefly.

Q. That is the practical commercial use to which you have devoted them?—A. Yes, sir; the use to which we have devoted them absolutely.

* * * * *

Q. What kind of a button do you make principally?—A. Well, shoe buttons; we make all these things into buttons.

Q. What are the buttons that you make used for most generally?—A. To-day they are used chiefly by us for these collar bars for soft collars. In other words we take two

of these buttons, and after we make them we put a metal link in between them. They are put in to hold the ends of the soft collar, but in three months from to-day our chief sale may be shoe buttons.

The following extracts from the testimony are given in further explanation of the facts:

F. J. Appelbee:

Q. Based upon your experience is it not true that the merchandise represented by Exhibits 1 and 2 is used chiefly in the manufacture of buttons?—A. Well, at the present time they are used chiefly for the making of those collar links.

Q. Collar links such as you introduced exhibits for?—A. At the present time; yes.

Q. Prior to the present time what have they been used for?—A. For buttons.

Mr. STRAUSS. The collar links is illustrative Exhibit C.

Q. What was the chief use of them at and prior to August, 1909?—A. The chief use then was for buttons.

Q. What kind of buttons?—A. Shoe buttons.

Q. For ladies' shoes particularly?—A. Well, ladies' shoes.

Q. They are still being used for making shoe buttons, aren't they?—A. To some extent.

Q. Are they also used for making buttons for white linen coats, or white coats worn by barbers and others?—A. Yes.

Hugo G. Veith:

Q. Please look at Exhibits 1 and 2 in this case, and tell me how long you have been familiar with merchandise of that character?—A. Over 30 years.

Q. At wholesale?—A. At wholesale.

Q. In the markets of this country?—A. Yes, sir.

Q. During all of that period that you have been familiar with them by what name have they been bought and sold in the markets of this country?—A. They have been imported and known in trade and commerce as beads.

Q. And has that been true during all the period that you have dealt in them?—A. Yes, sir.

Q. Have they been bought and sold as beads?—A. Yes, sir.

Mortimer Hyman:

Q. When beads are used for bead necklaces or trimmings they are used in their naked condition as they appear here, aren't they?—A. Yes, sir.

Q. Then you spoke of their possibly being utilized for some other purpose?—A. Yes.

Q. For instance, what other purpose?—A. They make buttons out of them.

Q. When they make buttons out of them they entirely change the nature of the bead, don't they?—A. By putting a shank and turning it into a button, which can be done with almost any bead—any bead.

Q. These articles are commonly used for making buttons, are they not?—A. They are now; yes, sir.

Q. That is probably the greatest use for them at the present time?—A. Yes, sir.

Q. Has that been true for about five years?—A. I don't know whether it is that length of time; I don't think it is more than two or three years to my knowledge.

Q. Is there any doubt in your mind that that is the chief use of these articles to-day?—A. At the present time, yes, I think its chief use is buttons.

Louis Rosenberg:

Q. State whether Exhibit 1 in question, samples that you have produced, were within or without the meaning of the term bead as used by your trade at the time stated?—A. Unquestionably beads.

Q. Has that always been true?—A. Yes, sir.

* * * * *

Q. Are you familiar with the use of these articles to-day, having reference to the articles in dispute; these agate pieces?—A. Yes.

Q. Do you know what they are chiefly used for at the present time?—A. There are two sizes specially imported for buttons—two or three sizes.

Q. And this particular size is one of them?—A. Yes, sir.

Q. This Exhibit 1?—A. Yes, sir.

Solomon B. Mendel:

Q. What is their chief use?—A. Exhibit 1 has been used almost exclusively for shoe buttons.

* * * * *

Q. Now, will you please tell me what the wholesale trade and commerce of this country—not the manufacturers, but the buyers and sellers—call the button blank?—A. Partly finished button.

Q. Any partly finished button?—A. I think so.

Q. Any material that can be possibly used in a button is called a button blank?—A. I think so, used for button purposes.

Q. Anything used for button purposes?—A. Yes.

Q. Then your inclusion of Exhibits 1 and 2 is based upon the fact that you know it can be used for button purposes?—A. Exactly.

Charles Blakeman:

Q. Having in mind, Mr. Blakeman, the trade meaning of the term "button blanks" at and prior to August, 1909, state whether its meaning would include merchandise like Exhibits 1 and 2.

Mr. STRAUSS. Objected to on the ground that it is incompetent, irrelevant, and immaterial, and the witness is not shown to be competent to answer, and sufficient foundation has not been laid. Objection overruled.

Mr. STRAUSS. Exception.

Last question read.

A. They have always been known as the same prior to 1909 as they would be up to to-day, ever since I can remember.

Q. Would they be included in the trade term "button blanks"?—A. Yes; they certainly would.

Q. Now, what is there, Mr. Blakeman, about the exhibits which enables you to identify them as button blanks?—A. Well, the shape and form, and everything else. If we manufacture a shoe button we have got to make it in that shape before we can put our shank in it, and consequently it is always known as a blank, and it is known until it is finished up.

* * * * *

Q. Is it a usual thing for a pearl button blank to have the shape of Exhibits 1 and 2 before you?—A. Well, we have got to put it in that shape before we can sell it for a button.

Q. I am talking now not about the button, but the button blank that you have been saying you bought and in some measure have sold. It is not in the shape of Exhibits 1 and 2?—A. I have blanks exactly the same in pearl.

C. H. Putnam:

Q. Confining yourself to the term "button blanks," was the meaning of that term definite, uniform, and general?—A. It is a uniform expression.

Q. (By General Appraiser McCLELLAND.) What did it mean?—A. It meant a blank. It meant partly a button.

Q. Describe it.—A. Well, it is a partly finished button. In other words it has all the finishes, except just a touch. It might need a hole or a little brad or a little finish on the face. It may just need a little work to finish it as a button.

Q. (By General Appraiser McCLELLAND.) Having in mind the form and general appearance of Exhibits 1 and 2, regardless of the material from which they are made, would they, or would they not have been included within the term "button blanks" prior to August 5, 1909?

Mr. STRAUSS. I object to your honor's question.

Objection overruled.

Mr. STRAUSS. Exception.

The WITNESS. They would be included as button blanks.

While the testimony as a whole is not free from contradictions, it may nevertheless fairly be concluded therefrom that for several years prior to the revision of 1909 the present merchandise continued to be bought and sold by bead merchants and to be commercially known as beads in that branch of trade and commerce, but that nevertheless during the same period the chief use of the merchandise in this country was in the manufacture of agate buttons, and among merchants dealing in button supplies these articles were commercially known as agate button blanks. This condition also obtained at the time of the present importations.

It thus appears that the history of such importations naturally falls into two parts, and it may be noted that the procedure at the customhouse changed with the changing use of the article. For many years such articles were regularly classified as beads and were so assessed; but afterwards, under instructions, the appraisers returned the same as agate button blanks or parts and they were assessed as such. But during the entire period there were also continuous importations into this country of buttons which were made of the same material as these, but which were pierced with two or more eyes for use in sewing the same upon garments. It is conceded that such buttons were all the time commercially known as agate buttons and that they were always assessed as such under the *eo nomine* provision for agate buttons. The importers claim that the buttons just described are the only ones which were ever within the purview of the agate-button classification of the several tariff enactments, whereas the Government contends that the present articles should be classified as agate-button blanks since they are the finished bodies of which agate buttons of a certain kind are made.

According to the recitals above appearing it seems that the commercial designation of the present article is so divided as to be no longer general, uniform, and definite and that the article itself under the circumstances would actually and properly bear both names alike, being at the same time an agate bead and an agate-button blank. This being the case a question at once arises concerning the relative degrees of specificity of these competing classifications. A consid-

eration of this question leads to no satisfactory conclusion. It may be said with equal propriety that the articles in question are beads which form only a kind or species of button blanks, or that they are button blanks which form only a kind or species of beads. Either term may thus be accepted as the species of which the other thereupon becomes the genus, and upon the whole it can not be said rightfully that either designation is in fact more specific than the other. In this situation the merchandise seems to fall within the final clause of paragraph 481 of the tariff act of 1909, which reads as follows:

If two or more rates of duty shall be applicable to any imported article, it shall pay duty at the highest of such rates.

According to this rule the merchandise should bear the higher rate of duty imposed upon the two classifications within which it falls. Inasmuch as this result has been reached by the present assessment the decision of the board sustaining the same is *affirmed*.

SCHADE & Co. v. UNITED STATES (No. 1404).¹

1. WHEAT.

"Wheat" is used in the tariff act of 1909 without limitation or qualification, and in the absence of a contrary commercial custom must be applied to every kind and class of merchandise embraced in the term.

2. WHEAT, "NO GRADE."

This importation was of frozen Manitoba wheat. Even if it be assumed that no commercial designation was shown, and that the merchandise here was improperly classed as "no grade," the record and the samples clearly establish that the common, ordinary designation of "wheat" applies, and this is so, though the wheat was confessedly of inferior quality, suitable alone for animal food.

United States Court of Customs Appeals, December 14, 1914.

APPEAL from Board of United States General Appraisers, G. A. 7552 (T. D. 34353).
[Affirmed.]

Ralph Pierson for appellants.

Bert Hanson, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, of counsel; *Charles D. Laurence*, special attorney, on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

DE VRIES, Judge, delivered the opinion of the court:

This appeal relates to the proper dutiable classification of a quantity of merchandise originating from Manitoba, Canada, and entered at the port of Chicago. It was there classified and assessed for duty as "wheat" under the provisions of paragraph 242 of the tariff act of August 5, 1909, which reads:

242. Wheat, twenty-five cents per bushel.

The importer protested, claiming the merchandise properly dutiable as an unenumerated unmanufactured article under the provisions of

¹ Reported in T. D. 35002 (27 Treas. Dec., 663).

paragraph 480 of the act. On appeal to the Board of General Appraisers the decision of the collector of customs at the port of Chicago was affirmed, and this appeal, therefore, brought here by the importers, involves solely the determination of the question whether or not the imported merchandise is "wheat" within that term as used in paragraph 242 of the said act.

Great diligence has been displayed by appellants' counsel in the collection of certificates and testimony of persons, official and otherwise, as to what constitutes wheat. This evidence is directed rather to the establishment of the different grades of wheat and their uses than to proof of a trade term within which the merchandise is included, or from which it is excluded by the general and uniform understanding of the trade and commerce of the United States. It is a matter of trade classification rather than of designation. In view of the industry displayed by importers' counsel in the collection of this evidence and his urgent insistence that his protest is well made and that the board erred we will with a degree of detail recite what we regard the more important parts of the material evidentiary facts in the case. We repeat, for the purpose of emphasis and that it may be constantly borne in mind in the consideration of the testimony offered, that the sole question in the case is whether or not the imported merchandise is wheat? The term is used in the tariff law without limitation, and, therefore, the court is bound to hold included therewithin for dutiable classification in the absence of an established trade usage every kind and description of wheat. It is a general term, and the rule long established in tariff interpretation is that where a general term is used in the law without qualification it must, in the absence of a contrary commercial custom, be applied in its broadest significance, including every kind and class of merchandise properly referable thereto, either directly or as a species the genus of which is embraced within the particular tariff nomenclature. *United States v. Wells, Fargo & Co.* (1 Ct. Cust. Appls., 158; T. D. 31211); *United States v. Salomon* (1 Ct. Cust. Appls., 246; T. D. 31277); *Schoellkopf, Hartford & MacLagan (Ltd.) v. United States* (71 Fed., 694).

Historically it seems that during the year in which this merchandise was grown the wheat crop in the Province of Manitoba, Canada, was extraordinarily large and the year excessively wet, so that great difficulty was experienced by the farmers in saving the crop. It is recited in the testimony that much of it was left in the shock all winter and some thrashed on the ground. Additional difficulty was encountered in that the railroads were unable to handle the crop on account of its abundance and the scarcity of labor, so that much of it when shipped was in transit for two or three months, and consequently a large percentage spoiled in transit. The wheat crop, therefore, of that Province and others similarly situated during

that year was largely of the same class. This importation was a part of that crop. It originated in Manitoba Province, Canada, and was billed from Fort William, Ontario, destined for South Chicago via steamer *A. G. Brower*.

By the consular invoice, which arrived in Chicago after entry by pro forma invoice, the merchandise is described as 84,045 bushels of "no grade feed wheat, tough." Upon arrival at the port of Chicago it was entered under oath without certified invoice by W. C. Frost as attorney in fact. The application describes the merchandise as "feed wheat, tough, no grade," and was made on May 15, 1912. The entry for immediate consumption, made on the same day, by the same attorney in fact, is so mutilated by interlineations that without explanation the names designated can not be assumed.

At the time of exportation, when the merchandise was, before being loaded, at Fort William, Canada, it was inspected and classified by the official inspector of grain for the division of Manitoba, Canada. It is described in his certificates as "Manitoba wheat, no grade, tough," "feed," and further classified as "*commercial grade*." Upon arrival at the port of destination and being duly submitted to the appraiser at the port of Chicago by the collector for appraisement, the latter official submitted samples to the Illinois State grain inspection department. These certificates introduced into the record designate it as "sample grade spring wheat." It was also by sample submitted by the appraiser to two seed houses in Chicago, one of which certified that it showed a test of 36 per cent germination and the other 34 per cent. A sample submitted to the Department of Agriculture at Washington returned germination 51.5 per cent. The appraiser's return, which is before us, recites that the Illinois State grain inspection department returned and graded the article as "sample grade wheat, weighing 47 pounds to the bushel, moisture test, 18.10."

At the hearings before the Board of General Appraisers several witnesses testified. The efforts of counsel for the importers seem to have been to establish that the imported merchandise was not fit for the purposes of making flour or for seed, and that it was not one of the recognized grades of wheat such as is classed in the wheat trade of the United States.

While it may be true that the importation was not commercially suitable for the making of flour or for seed, we think that those facts do not exclude it from classification as wheat as that term is used in the tariff act. Such testimony only establishes its classification in two of the several well-known uses of wheat. This assumption, however, does not presuppose that such unfitness was entirely established by this record. The samples of the merchandise submitted to the Department of Agriculture at Washington, D. C., for tests in this particular were returned as producing an expansion of flour of

about 60 per cent of the standard and a loaf of bread of about two-thirds of the standard, which was very coarse grained and of a very dark grayish-brown color. The crumb was somewhat sticky, the odor and flavor not unpleasant. It could be fairly said to be only of exceptional use as flour.

Upon the contention that this importation was not within the recognized trade grades of wheat several witnesses testified that different grades of wheat were recognized in the grain markets of different States of the Middle West. No one of them save Mr. R. J. Henderson was called upon to give an enumeration of these grades. This witness seems to have been well qualified in so far as his testimony went. He had been engaged in handling wheat about 28 years, the greater portion of that time in the part stated of the United States and a part of the time in Canada. He gave the grades as No. 1, hard; No. 1 Northern, No. 2 Northern, No. 3 Northern, No. 4 Northern, rejected and no grade—seven grades. He confined these grades to spring wheat. He stated that No. 4 grade was put in in recent years, but all the others were of long standing, and that the grades were created by the "Board of Warehouse Commissioners," a State board of the State of Minnesota generally recognized by the buyers and sellers as were similar grades in other States differing possibly in name only and not in application.

The controverted point in the case was whether or not "no grade," which seems of uniform use at least in the Middle West of this country and in Canada, expressed a grade of wheat or a limit beyond which the article ceased to be wheat commercially. Upon this Mr. Henderson, who was the importers' witness, testified:

Q. My point is this: Is the wheat designated as "no grade" wheat recognized in the trade as one of the grades of wheat?—A. Yes, sir.

He further delineated a difference in that the grades to and including No. 4 were oftentimes bought and sold in the markets by grade alone without sample, but that after or below that point wheat graded as "rejected" and "no grade" was bought only on sample. With such there must always be a sample. Nevertheless the testimony of this witness, which is the clearest upon the subject in this record and which is not contradicted but rather confirmed by the testimony of the other witnesses, seems to establish that "no grade" is a grade of wheat, though of inferior quality, which can be sold upon sample only and not according to grade without sample, as is the case with all the other grades except "rejected."

Mr. John Johnson was also called upon the part of appellants. Mr. Johnson is grain inspector for the Illinois Grain Inspection Department and had inspected the particular importation and made the reports in question. He testified:

Q. (By Mr. PIERSON.) Please state what this consisted of.—A. Badly frosted wheat, and under our ruling grain of that kind should be made nothing but sample grade.

Q. By the term "sample grade" you could include any wheat, no matter how badly damaged, which is above that, that takes the grade of "no grade wheat"?—A. Wheat that can not be graded; anything is graded "sample" wheat by our department.

Q. When you said that this wheat was badly damaged did you mean anything more than frosted?—A. That is all that is necessary. We have to state whether that car had such and such a thing. Our ruling "badly damaged" would come in "sample grade."

Having testified as to his initials upon certain certificates the following was elicited:

Q. What do the initials "SG" indicate?—A. Sample grade.

Q. And that means what?—A. Sample grade wheat is wheat that can not be graded.

Reading this testimony in the light of its inherent probabilities and in conjunction with the testimony of Mr. R. J. Henderson some light is thrown upon the actual situation. Sample grade and no grade wheat is wheat that can not be further graded than to be classed under the general designation "no grade" or "sample grade." It is called "sample" grade undoubtedly because a grade that by reason of the great varieties included has to be sold by sample only and not by grade. It is, nevertheless, a grade of wheat of this broad inclusiveness, and so recognized in the wheat trade in the localities stated.

This seems to accord also with the Canadian practice, for be it remembered that the inspector of grain for the division of Manitoba, whence this importation originated, classed it as "Manitoba wheat, no grade, tough," and further added "feed" and "*commercial grade*" in his certificates.

So that assuming that the testimony in this record, which was confined to the trade classifications of three Middle Western States and Canada, established *prima facie* a general uniform classification throughout the United States, we think this importation nevertheless falls within one of those grades known as the "no grade" or "sample grade" of wheat, a grade of such great range that it is bought and sold in the wheat markets by sample only for certainty but nevertheless as wheat.

In the other view, and assuming that no commercial designation or classification was established, it seems too obvious for discussion after reading this record and examining the sample in the case that this merchandise falls within the common ordinary designation of "wheat," though of an inferior quality and probably suitable for stock or chicken feeding purposes only.

After a careful review of all the testimony in this case, commencing with the designation of this merchandise as "wheat" in the consular invoice, followed by that in the oath to enter without certified invoice, and in all of the official certificates made by the officials examining the same, and by every witness who testified in the case, and finally being included as a grade of wheat known as "no grade" and "sample grade," we are satisfied that, though inferior, it is within the

tariff designation "wheat," whether as classed by any wheat trade or the general scope of that word. It may not be suitable for flour, and it may not be suitable for seed, but it undoubtedly falls within that large class of imported grains known as "feed." The market quotations of grain coming under the observation of all familiar therewith in this country are in many instances divided into two classes, (1) milling and shipping and (2) feed. The former by no means includes all of the wheat of commerce. There is no limitation or exposition in the testimony upon the character of feed wheat. None of the witnesses called dealt in that line of wheat, though one, Mr. Charles F. Sparks, for the importers, having examined a sample of this merchandise, stated:

I am more or less familiar with *feed wheats* offered in the markets. (Record, p. 18.)

The witnesses adduced were not such as dealt in feed wheat, and none was introduced nor was any testimony offered to show this merchandise not included within that designation by dealers in feed grains. It is a matter of common understanding, however, that much wheat is used for feeding stock and other than human animals, and the above is *prima facie* proof in this record of markets for such, were such proof needed in addition to the common knowledge of all. It is conceded in this record by the importers and the purchasers of this grain that it was actually used for making chicken feed and that it was suitable for that purpose.

We are, therefore, of the opinion that the decision of the Board of General Appraisers should be, and is, *affirmed*.

KRAEMER & CO. v. UNITED STATES (No. 1411).¹

NECKLACES—JEWELRY.

Jewelry requires work in metal and a metal neck chain with a clasp constitutes jewelry or parts of jewelry. *United States v. Goldberg* (3 Ct. Cust. Appls., 282; T. D. 32573). Metal appears here in the clasps designed to constitute the article a necklace when completed. They are sold to jewelers and are apparently as susceptible of use on necklaces of metal as of beads.

United States Court of Customs Appeals, December 14, 1914.

APPEAL from Board of United States General Appraisers, Abstract 35398 (T. D. 34398).

[Affirmed.]

Allan R. Brown for appellants.

Bert Hanson, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, of counsel), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

This is an appeal from a decision of the Board of General Appraisers sustaining a classification as parts of jewelry under paragraph 448 of

¹ Reported in T. D. 35003 (27 Treas. Dec., 668).

the tariff act of 1909 of articles described as plain brass snaps with ring or ball at the ends to which to attach a cord; necklace clasps in the form of a bead and evidently intended for bead necklaces; and jet colored clasps.

The articles are claimed to be dutiable as articles or wares composed wholly or in part of metal at 45 per cent ad valorem under paragraph 199.

The board predicated its decision upon *Cohn v. United States* (4 Ct. Cust. Appls., 378; T. D. 33536). As pointed out in the brief of the appellant, the determination in that case was made upon a concession of counsel that the articles in question were properly classifiable as jewelry.

The case in this court nearest in point is that of *United States v. Goldberg* (3 Ct. Cust. Appls., 282; T. D. 32573), to which reference will be made later. There are cases cited in which it has been held that beads adapted for use as strings of beads are not articles of jewelry. See *American Bead Co. v. United States* (3 Ct. Cust. Appls., 509; T. D. 33166).

In the case of *United States v. Goldberg*, *supra*, it was held that a metal neck chain is jewelry, and that a clasp therefor is a part thereof, and that within common knowledge and judicial cognizance these articles are jewelry or parts of jewelry. That case rules the present case unless we distinguish between metal necklaces and bead necklaces.

The fact that strings of beads are not dutiable as jewelry does not mark a distinction between manufactured bead necklaces and metal necklaces. A distinction was noted in *United States v. Hawaii and South Seas Co.* (T. D. 26778) between strings of shells and manufactured necklaces, and we think such a distinction is sound. Jewelry was originally the work of a jeweler. It required work in metal, and yet the product of the jeweler's art was not necessarily wholly of metal. Cheaper jewelry has come to be manufactured almost entirely by machinery, but the necessity of the presence of some form of wrought metal to constitute it jewelry still exists, and such wrought metal appears in the present case. It consists of the clasps which are designed to constitute the article when completed a necklace. The fact that the articles are cheap does not prevent their classification as jewelry. The testimony in the present case shows that these articles, of a little more expensive class, are sold to jewelers, and they are apparently as susceptible of use on necklaces of metal as of beads.

It is claimed that certain of the clasps, jet colored, are dutiable as jet. Unfortunately the sample has in some way disappeared, and the evidence fails to distinguish between these articles and the other exhibits in the case.

Decision *affirmed*.

ATWOOD-STONE CO. v. UNITED STATES (No. 1414).¹

STORED WHEAT, "BIN BURNED."

This wheat was stored in a damp condition and it heated and fermented and became "bin burned." To prevent further deterioration it was subjected to a process of dry heating. Notwithstanding the commodity had been "bin burned" and "dry heated" it remained essentially wheat and was bought and sold as wheat.—United States v. Devereux (135 Fed., 428) and Malouf v. United States (1 Ct. Cust. Appls., 437; T. D. 31502) distinguished.

United States Court of Customs Appeals, December 14, 1914.

APPEAL from Board of United States General Appraisers, Abstract 35531 (T. D. 34440).

[Affirmed.]

Cassaday, Butler, Lamb & Foster for appellant.

Bert Hanson, Assistant Attorney General (*Charles D. Lawrence*, special attorney, of counsel), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

SMITH, Judge, delivered the opinion of the court:

Merchandise invoiced as feed or condemned wheat and imported into the United States from Fort William, Canada, was classified as wheat by the collector of customs for the district of Superior, Wis., and assessed for duty at 25 cents per bushel under the provisions of paragraph 242 of the tariff act of 1909, which paragraph is as follows:

242. Wheat, twenty-five cents per bushel.

The importers protested that the importation was not wheat, but a nonenumerated unmanufactured article dutiable at 10 per cent ad valorem under that part of paragraph 480 of said act, which reads as follows:

480. That there shall be levied, collected, and paid on the importation of all raw or unmanufactured articles, not enumerated or provided for in this section, a duty of ten per centum ad valorem, * * *.

The Board of General Appraisers overruled the protest and the importers appealed.

The testimony submitted to the board by the importer was to the effect that the product under consideration was wheat which had been "bin burned" by reason of the fact that it had been stored in a damp condition. Stored in that state a heating or fermentation of the wheat set in, which shriveled the grain and gave it an unpleasant odor. To prevent further deterioration the product was then subjected to a process of dry heating, which apparently removed the odor and not only checked the fermentation but precluded its recrudescence. The "bin burning" of the wheat and the processing to which it was submitted discolored the grains, made them

¹ Reported in T. D. 35004 (27 Treas. Dec., 670).

useless for the manufacture of white flour or of any flour which would raise, and reduced the value of the article from about 80 cents a bushel to 50 cents a bushel. With the exception that the grains were slightly shriveled, they retained, however, the characteristic form and all the physical constituents peculiar to wheat. Some of the corporeal elements of the cereal were unquestionably impaired by storing it while damp. The germinating principle in a large percentage of the grains and the elastic entangling characteristics of the gluten were certainly destroyed by the dry-heat treatment to which the product was subjected in order to stop fermentation. Nevertheless, the impairment of the physical components of the wheat and the destruction of the principle which made it available as seed affected the quality, not the essence, of the article, and it can not be said that either factor or both together destroyed the wheat or evolved something new which was not wheat. So far as we can discover from the testimony and from the evidence afforded by the samples, the commodity, notwithstanding that it had been "bin burned" and "dry heated," was still wheat, had a marketable value as wheat, and was bought and sold as wheat. True, it was called feed or condemned wheat, but that designation indicated a grade of wheat rather than an entity or substance which was not wheat, as is shown by the testimony of H. G. Atwood, president of the American Milling Co., Carl S. Miner, and W. A. Scott, witnesses for the importers, who testified as follows:

H. G. Atwood:

Q. You don't mean to say that there is no wheat but the milling wheat?—A. Milling wheat, condemned wheat, feed wheat.

Carl S. Miner:

Q. (By Mr. WEMPLE.) You call this wheat, don't you?—A. Yes, sir, I call it wheat; I call it feed wheat.

W. A. Scott:

Q. What is it fit for?—A. It is feed wheat, just the same as feed barley. It is damaged wheat.

Q. What do you mean by feed wheat?—A. Feed wheats are all wheats that are not fit to be manufactured into flour. Marketable wheat, not fit for flour.

To support their contention that the merchandise is not wheat the importer cites Abstract 19941 (T. D. 29339), *United States v. Deveaux* (135 Fed., 428), and *Malouf v. United States* (1 Ct. Cust. Appls., 437; T. D. 31502).

In the first two cases it was apparently held that a commodity invoiced as feed screenings in the one case and wheat screenings in the other, and which was worthless for seeding or for the manufacture of human food could not be classified as wheat. Without passing upon the soundness or unsoundness of that rule, it is sufficient

to say that it has no applicability to the goods involved in this appeal, for the reason that it affirmatively appeared from the evidence that from 12 to 20 per cent of the importation still retained the power of germinating, and there was no testimony from which it could be fairly concluded that the importation might not be used for the making of some kind of breadstuffs. The discoloration of the grains and the impairment of the gluten certainly did preclude its use for the manufacture of a white flour which would "raise," but from the fact that it was not available for the manufacture of such a flour it can not be deduced that it was unavailable for the production of breadstuffs similar to those which are made from corn-meal, rye, oats, or barley. The term "bread" is not confined to those breadstuffs which are made from white flour or from flour which will "raise," but is broad enough to cover all articles of food made from the flour or meal of grain, whether it will "raise" or not.

The merchandise which was the subject of controversy in the case of *Malouf v. United States* was not at all of the same character as that here involved. The merchandise there involved was really a manufacture of wheat, produced by boiling, drying, and grinding the grain. That treatment, as appears from the decision, not only destroyed the form but eliminated the bran and enveloping tissues which are characteristic of wheat. So much was the original material modified by the process of manufacture to which it was subjected that, as was said in that decision, it no more produced the "impression or mental picture of wheat than would crushed amber."

In our opinion the merchandise imported is an inferior grade of wheat, and of the issue here involved we can say with confidence what was said by Judge Lochren in the *Devereux* case:

The single question is whether this article is wheat. No distinction as to grades of wheat, is made by the tariff. A sample of the article shows the grains of which it is composed, and any person looking at such sample would unhesitatingly pronounce it to be wheat, somewhat injured.

The decision of the Board of General Appraisers is *affirmed*.

UNITED STATES v. AMERICAN RAILROAD CO. OF PORTO RICO (No. 1434).¹

ADVANCEMENT IN THE COURSE OF MANUFACTURE.

The importation was of pile protectors made of sectional, semicircular iron plates, which when riveted together took a drum shape. As to the point whether the holes in the plates were punched before or after rolling, the testimony is distinct that they were punched after rolling. This constitutes an advancement in the course of manufacture beyond hammering, rolling, or casting, resulting in changing the crude article into a form ready for actual use. The merchandise was properly assessed under paragraph 199, tariff act of 1909, as manufactures of iron not specially provided for.

¹ Reported in T. D. 35005 (27 Treas. Dec., 672).

United States Court of Customs Appeals, December 14, 1914.

APPEAL from Board of United States General Appraisers, Abstract 35945 (T. D. 34571).

[Reversed.]

Bert Hanson, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, of counsel; *Frank P. Wilson*, special attorney, on the brief), for the United States.

Jules Chopak, jr., for appellee.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

This case involves two importations of like character. The importations consist of pile protectors, each protector being composed of eight sections, each section of two semicircular iron plates one-fourth of an inch thick, which when riveted together make a drum about 5 feet in diameter and 5 feet in height. Duty was assessed upon each importation at the rate of 45 per cent ad valorem under paragraph 199 of the tariff act of 1909 as manufactures of iron not specially provided for. The protest claims that the merchandise is dutiable at four-tenths of a cent per pound under paragraph 121 of the act of 1909. For convenience, these two paragraphs are here quoted:

199. Articles or wares not specially provided for in this section, composed wholly or in part of iron, steel, lead, copper, nickel, pewter, zinc, gold, silver, platinum, aluminum, or other metal, and whether partly or wholly manufactured, forty-five per centum ad valorem.

121. Beams, girders, joists, angles, channels, car-truck channels, T T, columns and posts or parts or sections of columns and posts, deck and bulb beams, and building forms, together with all other structural shapes of iron or steel, not assembled, or manufactured, or advanced beyond hammering, rolling, or casting, valued at nine-tenths of one cent per pound or less, three-tenths of one cent per pound; valued above nine-tenths of one cent per pound, four-tenths of one cent per pound.

The testimony as to the method of manufacture of these pile protectors was taken by deposition and consists of the testimony of a single witness, Leon Brulé. He testified that the firm with which he is connected manufactured the goods in question. When asked to state the processes of manufacture, he said that the plates were traced exactly to dimensions given, then sheared; the stretching irons were then used after the plates were heated, the plates were then laid out for the purpose of marking the rivet holes, these holes were then punched, and then the plates were rolled by the machine. After these different operations, the plates forming the cylindrical sections were assembled together to assure the agreement of these holes. On cross-examination he was asked:

Q. Were the rivet holes punched or were they drilled?—A. They were punched.

Q. Were the rivet holes produced after the plates or other pieces had been formed by hammering, rolling, or casting?—A. The holes were punched after rolling.

Q. Is it not true that every article or piece of metal in the importations was treated before importation with some operation other than that of hammering, rolling, or casting?—A. Yes, the work of punching the holes was as indicated in the fifth question and then the plates were rolled by the machine.

This testimony is seemingly self-contradictory, but this contradiction may be owing to an error in translation, as it appears that the testimony was taken and answers were given in French, and translation afterwards furnished by the importers. It might well be that there was error in translating the statement, as to the sequence with which the work was done, in the answer to the direct interrogatory, and in answer to the later cross-interrogatory. But the fact remains that when the question was put directly to the witness as to whether the holes were produced after the plates had been formed by hammering, rolling, or casting, the answer is distinct that they were punched after rolling.

The case then presents the single question as to whether the punching of these holes is an advancement in the course of manufacture beyond hammering, rolling, or casting. We think it must be said that it is a further process of manufacture after the rolling process. It results in making out of a crude article the form ready for actual use. Nothing remained to be done except to put the parts together at the place of destination, they having been in fact assembled, according to the testimony of the witness, at the place of manufacture to assure the agreement of the holes. It is true that they must then be riveted to complete the article, but to say that they are not advanced beyond the hammering process is to ignore the important fact of the punching of the rivet holes.

We held in the recent case of *Kuyper v. United States* (5 Ct. Cust. Appls. 175; T. D. 34253) that paragraph 121 was intended to cover a class of merchandise of a cruder form and ordinarily advanced to a less degree of manufacture and completeness than paragraph 131, and that paragraph 121 enumerates as dutiable articles which have been subjected to the more common processes of hammering, rolling, or casting. It is true the precise question here involved was not there discussed, but the case is authority to the point that paragraph 121 was intended to define only crude articles and the distinct restriction that such articles should not be advanced in condition beyond hammering, rolling, or casting would seem to place a limitation, which has been exceeded in this case by the process of punching rivet holes.

A similar question was before the board in T. D. 31180. There the merchandise consisted of railroad ties of steel cut the proper length, with bolt holes punched in each end. They were claimed to be dutiable under paragraph 131 of the act, which covers a variety of articles, including steel "pressed, sheared, or stamped shapes not advanced in value or condition by any process or operation

subsequent to the process of stamping," and concluding with a provision for steel not specially provided for. The board held, in effect, that this provision for steel not specially provided for had relation to the unfinished forms of steel of like character as those previously mentioned as "material," and that the articles there in question were completed articles to be bolted together and that they were advanced beyond the condition provided for by paragraph 131.

As to what amounts to an advance in condition of an article beyond the crude state, see *United States v. Richter* (2 Ct. Cust. Appls., 167; T. D. 31680), *United States v. Westrumite Co.* (1 Ct. Cust. Appls., 400; T. D. 31480), and *Birtwell v. Saltonstall* (39 Fed., 384).

The board in the present case sustained the protest. We think this was error. The decision is *reversed* and the assessment sustained.

FIELD *et al.* *v.* UNITED STATES (No. 1416).¹

1. ARROW-POINT GLOVES—EMBROIDERED LEATHER GLOVES.

These gloves with so-called arrow-point embroidery are made with a machine carrying a single needle but two threads, stitching up and down the back, and the arrow points are produced by handwork. Whether they were subject to the additional duty provided for by paragraph 459, tariff act of 1909, is to be determined not by the number of rolls or lines of stitching or embroidery but by the number of strands or threads employed in producing the effect; and here, owing to the fact that only two threads were employed, the provision for additional duty can not apply.

2. STRANDS—CORDS—THREADS.

The uniform course of opinion with the courts is that these words were, as used in this connection, namely, "strands," "cords," and "threads," equivalent in meaning.

United States Court of Customs Appeals, January 15, 1915.

APPEAL from Board of United States General Appraisers, Abstract 35604 (T. D. 34459).
[Reversed.]

Curie, Smith, & Maxwell (Thomas M. Lane of counsel) for appellants.

Bert Hanson, Assistant Attorney General (*John J. Mulvaney*, special attorney, on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

SMITH, Judge, delivered the opinion of the court:

Certain gloves, designated in the invoice as "arrow point," were classified by the collector of customs at the port of New York as "leather gloves embroidered with more than 3 single strands or cords" and were accordingly assessed with the additional duty of 40 cents per dozen pairs provided by that part of paragraph 459 of the tariff act of 1909 which reads as follows:

459. In addition to the foregoing rates there shall be paid the following cumulative duties: * * *; on all gloves stitched or embroidered, with more than three single strands or cords, forty cents per dozen pairs.

¹ Reported in T. D. 35144 (28 Treas. Dec., 213).

The importers protested that the gloves in question were not stitched or embroidered with more than three single strands or cords, and that therefore they were not subject to the additional duty imposed by the collector.

The Board of General Appraisers overruled the protest, and the importers appealed.

On the backs of the gloves in controversy three distinct raised effects have been produced by creasing and stitching the leather of the glove longitudinally into the form of three unnotched arrows. The shaft of each arrow is ornamented on both sides by a single line of stitching in red thread. The shaft and ornamental stitching are produced by a one-needle machine, carrying one thread for the needle and another for the bobbin. The raised barbs of the arrow are made by creasing the leather about three-eighths of an inch below the point of the shaft and stitching the crease together by hand.

In support of their appeal the importers contend, first, that the ornamental stitching on the back of the gloves was done by a machine carrying a single needle and but two threads, and that, therefore, under the principle established in the case of *United States v. Wertheimer & Co.* (4 Ct. Cust. Appls., 338; T. D. 33528), such gloves can not be considered as stitched or embroidered with more than three single strands; second, that the raised effects produced by folding and stitching the leather together are not cords within the meaning of paragraph 459, and that even if they could be so regarded they do not exceed three in number and, consequently, do not bring the merchandise within the classification of gloves stitched or embroidered with more than three cords.

The Government, on its part, argues, first, that the word "strands," as that term is used in paragraph 459, relates to the number of lines of stitching or embroidery on the back of the glove and not to the number of threads by which that effect was accomplished; second, that the word "cords" as used in the paragraph is not synonymous with "strands," but signifies a raised effect made by creasing and stitching together the leather into the form of a rib or cord; third, that the shafts and barbs of the "arrows" must be counted as separate raised effects, and that, therefore, the gloves are embellished with at least 9 cords; fourth, that each thread employed in stitching the creases together must be counted as 2 strands, and that as there are 9 such creases, the gloves, excluding the 6 lines of ornamental stitching, are stitched with 18 single strands.

The board and the courts have repeatedly held that whether leather gloves were or were not to be subjected to the additional duty of 40 cents per dozen pairs was to be determined not by the number of rows or lines of stitching or embroidery but by the number of strands or threads employed in producing the effect. *In re Robinson* (T. D.

19945); *United States v. Robinson* (124 Fed., 1013); *Trefousse v. United States* (144 Fed., 708, affirmed by the Circuit Court of Appeals, 154 Fed., 1005); *United States v. Le Fetra* (172 Fed., 297).

These decisions, which were had under the tariff act of 1897, were approved and ratified by Congress by the reenactment of the interpreted provision in the tariff act of 1909.

As the lines of stitching on the gloves involved in this case were made by a one-needle machine, carrying one thread for the needle and one for the bobbin, we think it is clear that they were not stitched or embroidered with more than three single strands or threads, and that, therefore, under the decision of this court in *United States v. Wertheimer* (4 Ct. Cust. Appls., 338, 343; T. D. 33528), the first and fourth contentions of the Government can not be sustained.

That brings us to the consideration of whether the Government's claim that the raised effects produced on the gloves by creasing the leather and stitching it together are cords within the intention of paragraph 459. Leaving to one side the consideration that gloves could hardly be stitched or embroidered with a crease, and conceding for the moment that stitched or embroidered with cords means stitched or embroidered into something resembling a cord or into such cords or ribs as are found in corduroys and other textiles, we are at a loss to understand by what process of reasoning the conclusion is reached that the three arrows constituting the raised effects on the back of the gloves in question must be regarded as cords within that definition. The arrows neither resemble a cord nor give the impression of the cords or ribs which are characteristic of certain kinds of textiles.

But however that may be, we do not think that the term "cords" can be given the signification for which the Government contends without disregarding the long line of decisions which have received legislative approval and which have persistently regarded "strands" and "cords" as designations for the filaments or threads used to embellish the backs of gloves.

In T. D. 10910 the Board of General Appraisers, it is true, described the gloves which were there in controversy as gloves having "three pairs of plain raised cords, some of the cords ending in what are termed spear points." In the very same decision, however, the board held that the strands or cords referred to in paragraph 458 of the tariff act of 1890 were strands or cords of embroidery, and in effect held that a plain cord was not embroidery. In T. D. 12103 the board reaffirmed its holding that plain, smooth, straight cords raised on the backs of gloves were not embroidery, and that gloves having such effects were not subject to the cumulative duty prescribed by paragraph 458.

In *Wertheimer v. United States* (77 Fed., 600), however, it was flatly held by the Circuit Court that, as used in paragraph 458,

"strands" or "cords" meant *strands* or *cords* of the embroidery and not the three lines or points of the material raised up and sewed through and through.

Under paragraph 445 of the tariff act of 1897, which amended paragraph 458 of the tariff act of 1890 so as to read "on all gloves stitched or embroidered, with more than three single strands or cords, forty cents per dozen pairs," it was held in *United States v. Robinson* (124 Fed., 1013) that gloves having "three rows of embroidery each of a single cord passing more than once throughout the decoration," were not subject to the cumulative duty prescribed by the paragraph. This decision, acquiesced in by the Government, was based on the fact that although each row of embroidery had more than one line of stitching, but one thread or cord was used in making it. In reaching that conclusion it was of course necessary to hold that "cord" meant thread, and not a raised effect produced by creasing the leather.

The Robinson case to the contrary notwithstanding, it was again decided by the board in T. D. 25038 that a cord as understood in the glove trade was an embellishment on the back of a glove produced by creasing the leather longitudinally and the oversewing of the same with a silk thread. On the evidence adduced, the board found that, commercially speaking, a "strand" was synonymous with the term "row of embroidery," and that a "cord" was stitched and a "strand" embroidered. (Contra, T. D. 28966.) It will be noted, however, that the board confined the term "cord" to the creased leather which was *oversewn with silk thread*, and that a plain crease was apparently not included within the trade designation. Indeed, plain, smooth, raised effects such as are found in the goods here in controversy have never been held either by the Board of General Appraisers or by the courts to be cords within the contemplation of any provision imposing additional duty on gloves stitched or embroidered with more than three strands or cords.

In *Trefousse v. United States* (144 Fed., 708) the court expressly refused to approve the rule laid down by the board in T. D. 25038, and declared that the Robinson case should have been followed, and held that the gloves having on the back three rows of embroidery "produced by a needle with only one cord or strand of thread" were not stitched or embroidered with more than three single strands or cords. The decision of the Circuit Court was affirmed by the Circuit Court of Appeals in *United States v. Trefousse* (154 Fed., 1005).

United States v. La Fetra (172 Fed., 297) and *United States v. La Fetra* (178 Fed., 1006) reaffirmed the doctrine of the Robinson and Trefousse cases, and from that it may well be concluded that the meaning of the words "strands" and "cords," as used in paragraph 445 of the tariff act of 1897, was judicially settled. When it came to

the passage of the tariff act of 1909, that part of paragraph 445 of the act of 1897 which imposed on gloves an additional duty of 40 cents per dozen pairs was reenacted in identical language as paragraph 459, and that reenactment, we think, must be accepted as a legislative approval of the interpretation given to the provision by the courts.

The decision of the Board of General Appraisers is *reversed*.

HENSEL, BRUCKMANN & LOEBACH *v.* UNITED STATES (No. 1419).¹

ROCK DRILLS—BAR HOISTS—STEAM ENGINES.

The testimony shows both as to these rock drills and bar hoists that they were manufactured as machines to be operated by compressed air and as to the bar hoists they were specially designed for use underground where steam can not be employed as a propelling force. The articles can not be deemed steam engines and they were properly assessed as manufactures of metal.

United States Court of Customs Appeals, January 15, 1915.

APPEAL from Board of United States General Appraisers, G. A. 7566 (T. D. 34458).

[Affirmed.]

Albert J. Washburn and *George A. Puckhafer* for appellants.

Bert Hanson, Assistant Attorney General (*Thomas J. Doherty*, special attorney, no the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

The protests in this case cover certain mining machinery consisting of rock drills and bar hoists and their respective parts. Duty was levied thereon at 45 per cent ad valorem under paragraph 199 of the tariff act of 1909 as manufactures of metal. The competing paragraph relied upon is paragraph 197 of the same act, and the only claim urged in this court is that the merchandise is dutiable under the provision for "all steam engines."

Appellants in their brief state that "the decision of the board in effect is that the ultimate use or method of operation of the article after it arrives in this country is to be the determining factor in the classification for duty rather than the inherent qualities of the article itself."

We think the board did not intend to assert this rule. Reference is made in the opinion to the uses to which the machines are put, but as we read the opinion it is not in conflict with the rule which was announced by the Supreme Court in *Worthington v. Robbins* (139 U. S., 337, 341), the authority of which has been recognized by this court in *Moore v. United States* (1 Ct. Cust. Appls., 115, 117; T. D. 31117), *Athenia Steel & Wire Co. v. United States* (1 Ct. Cust. Appls., 494; T. D. 31528), and *United States v. Lyon & Healy* (4 Ct. Cust. Appls., 438, 441; T. D. 33873).

¹ Reported in T. D. 35145 (28 Treas. Dec., 217).

The real question in the present case is whether the articles imported in the condition as imported come within the meaning of the term "steam engine." The evidence as to the condition of the article when imported was given by a witness for the importers, as it related to rock drills, as follows:

Q. These rock drills of yours, can they be employed with compressed air or steam interchangeably?—A. Yes, sir.

Q. Precisely the same drill?—A. I should say not precisely, in that an alteration is made in a portion of the drill to adapt it for steam, when it is sold for compressed air, and to adapt it to air, when it is sold for steam. In other words, an attachment.

Q. How were these fitted as imported? Were they made for compressed air or for steam?—A. They were imported for air, because we sell them for air.

As to the bar hoists, the witness describes this as a hoisting engine specially designed for mining requirements, and so constituted that it is capable of being set upon a column, for which reason it is sometimes called in mining parlance a "stretcher bar"; that all the hoists covered by these protests are of such character; that, while it may be practicable to operate the same with steam or compressed air interchangeably as a motive power, it is, nevertheless, impracticable to use steam for that purpose when the hoists are employed for underground work; that these hoists are used largely, if not exclusively, in mines, and that miners would have very little use for them above ground.

It further appears from the testimony that in the use of compressed air in mining operations some independent power must be applied to produce the compressed air which in turn operates the engine or machine; that this condensed air is produced by an air compressor which may be operated by a steam engine, or by an electric engine, or by water power, but the force which operates the machines in question here, in their condition as imported, is compressed air and not steam.

It is true that the witness refers to a change in the machine as imported, adapting it to use as a steam engine, as a change in an attachment, and it is said "that such attachment is too insignificant to change the substantial character of the article with its chest, cylinder, valve gear, and piston any more than buttons on a coat would change the classification of the coat as wearing apparel," citing *Seeberger v. Schlesinger* (152 U. S., 581, 587), where the language is used:

We do not wish to be understood as holding that, if the metal be a mere incident or an immaterial part of the completed article, as, for instance, the screws or knobs upon an article of household furniture, or the buttons upon an article of clothing, such articles should be classified as manufactures in part of metal.

Such a case is clearly distinguishable from the present. This is something more than adding an attachment for the purpose of using the machinery in question here as a steam engine. The attachment which is added to this machine and becomes a part of it as imported

was designed for the purpose of adapting it to making it usable as and only as a compressed-air machine, and only usable by applying compressed air, whereas to constitute it a steam engine, a change in the appliance must be made not only by adding an attachment but by removing the attachment from the machine as it is imported and substituting another, something which we have no reason to expect will occur or was ever contemplated by the importer or by anyone dealing with such articles.

We think the board committed no error in overruling the protest, and that the finding of the board that the bar hoists were specially designed for underground work where steam can not be employed as a propelling force and are likewise compressed-air engines is fairly supported by the testimony in the case.

Reference is made to an alleged injustice of the importer being compelled to pay a higher tax than his competitor who uses or sells the same mechanisms (substantially) for above-ground use, in which case steam is employed as the motor fluid. There may be ground which would justify the Congress in taking this apparent injustice into account, but it is not the province of the court to remedy any inequalities that may exist in the tariff law. We are of the opinion that these goods as imported were not steam engines, this opinion not being predicated alone upon the fact that such was not their intended use, but upon the fact that as introduced into the commerce of the country they were not in condition to be used as steam engines or designed for or adapted to use other than as compressed-air machines to be used underground.

The decision of the Board of General Appraisers is *affirmed*.

UNITED STATES *v.* WYMAN & Co. (No. 1426).¹

TOYS OF COTTON GOODS.

The merchandise consists of cotton cloths in patterns ready to be cut and sewed to make single garments, these to be worn by young children. The decision is limited to the articles, samples of which were produced. These cotton goods can hardly have any utility beyond that of a mere plaything, and they are sufficiently advanced in manufacture to be treated as parts of toys.

United States Court of Customs Appeals, January 15, 1915.

APPEAL from Board of United States General Appraisers, Abstract 35927 (T. D. 34571).

[*Affirmed.*]

Bert Hanson, Assistant Attorney General (*Thomas J. Doherty*, special attorney, on the brief), for the United States

Comstock & Washburn (*J. Stuart Tompkins* of counsel) for appellees.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

The merchandise involved in this case consists of cotton cloths imported in patterns ready to be made into children's pinafores and

¹ Reported in T. D. 35146 (28 Treas. Dec., 220).

highly colored and decorated with characters corresponding to those used in the uniform of the lancer or dragoon, respectively. As imported, each piece is ready to be cut and sewed to make a single garment, which may be worn by young children. The goods were classified for duty under paragraph 324 of the act of 1909 as partly manufactured wearing apparel composed of cotton. The importers protested against this assessment, claiming the goods to be dutiable under paragraph 431 as toys or parts of toys. The board sustained the protest and the Government appeals.

Paragraph 418 of the act of 1897 contained a provision in all respects similar to the present paragraph 431, except for the addition in the latter paragraph of the term "parts of toys." The board had before it in 1904 certain clown sets composed in part of wool attached to cardboards, which consisted of loose-fitting gowns, such as clowns usually wear, gaudily decorated with grotesque figures of birds, animals, and flowers, and held the same classifiable as toys. From this decision an appeal was taken to the Circuit Court for the Eastern District of Pennsylvania, but upon authority of the Attorney General was discontinued.

Limiting that case, as we should be disposed to do, to articles which are strictly of the same class as those involved in the case cited, it is fair to assume that the language employed in the act of 1909 was intended to be used in view of this judicial construction, and the language appearing in the present act should be given a like construction unless there be convincing reasons for another. This construction goes to the extent only of treating that case as authority for the class of cases which were there directly involved. Whether it should be extended to such articles as are in imitation of uniforms of soldiers, firemen, or policemen, but being adapted to use as ordinary wearing apparel, is a question not now before the court. As to the present articles, the board said:

Whether the articles are worn by children or are used for making dolls, we are of opinion that they are toys—that is to say, playthings, things intended and designed for the amusement of children only, and which by their very nature and character are reasonably fitted for no other purpose. No parent would buy a thing of this character as an article of clothing. It is a toy, pure and simple, and is intended to be worn by children while at play. It is designed to be made into soldier suits, rough-rider suits, Indian suits, sailor suits, etc., to be used in play by children of the age of perhaps 3 or 4 years.

We limit ourselves in this case to the articles of which samples are produced. We are not prepared to say that all imitations of sailor suits, or all imitations of rough-rider suits, or, for instance, Boy Scout suits, may not be of a character which would be well adapted for the common wear of children, and have to that extent a utilitarian purpose which would distinguish them from toys. But the articles here in question are so highly embellished as to be almost

said to be fantastic. If they have any utility beyond that of a mere plaything, it certainly would be a very limited and restricted one. They would be designed to engage the fancy of the child and furnish him amusement in an assumed representation of the lancer or dragoon. We are not prepared to say that as to these articles the finding of the board was not justified.

It is contended, however, that these articles are not complete toys, as they require a process of manufacture after importation, and it is also urged that they are not parts of toys, because, as imported, they comprise the entire article. This, however, is not quite accurate, as to be complete they require sewing, hooks and eyes, or buttons. We think that they may be said to be parts of toys. The portion which is to be cut away is negligible and insignificant.

That they are sufficiently advanced to be treated as parts of toys is supported by the decision of this court in *United States v. Lyon & Healy* (4 Ct. Cust. Appls., 438; T. D. 33873).

It results that the decision of the board is *affirmed*.

KEDDEN & MARTIN *v.* UNITED STATES (No. 1427).¹

UNFINISHED SCISSORS BLADES.

These articles have been brought into a condition where their only practical use or purpose is to be finished as scissors blades, and they are commercially unsuitable for any other purpose. They were properly assessed under the provision for "scissors and shears, and blades for the same, finished or unfinished," in paragraph 152, tariff act of 1909.

United States Court of Customs Appeals, January 15, 1915.

APPEAL from Board of United States General Appraisers, G. A. 7573 (T. D. 34546).
[Affirmed.]

W. Evans Hampton for appellants.

Bert Hanson, Assistant Attorney General (*Frank F. Wilson*, special attorney, on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MARTIN, Judge, delivered the opinion of the court:

The merchandise involved in this case was imported under the tariff act of 1909. The appraiser reported it to be "unpunched, unfinished scissors, sometimes called scissors forgings, intended to be ground down, punched, and manufactured into finished scissors." An advisory return of the merchandise for duty as "unfinished scissors" under paragraph 152 of the act was reported by the appraiser. In accordance therewith the collector assessed duty upon the importation as "unfinished scissors" at 15 cents per dozen and 15 per cent ad valorem when valued not over 50 cents per dozen, and 50 cents

¹ Reported in T. D. 35147 (28 Trans. Dec., 222).

per dozen and 15 per cent ad valorem when valued at more than 50 cents but not more than \$1.75 per dozen, all under the terms of paragraph 152 of the act of 1909.

The importers protested against the assessment, denying that the merchandise was unfinished scissors, and claiming duty thereon at 30 per cent ad valorem as forgings under paragraph 123 of the act, or, alternatively, at 45 per cent ad valorem as manufactures of metal under paragraph 199 of the act.

The protest was submitted upon exhibits and other testimony to the Board of General Appraisers, and the same was overruled by the board. The importers now appeal from that decision.

The following is a copy of the competing provisions of the tariff act of 1909 thus called into question:

123. * * * Forgings of iron or steel, or of combined iron and steel, but not machined, tooled, or otherwise advanced in condition by any process or operation subsequent to the forging process, not specially provided for in this section, thirty per centum ad valorem; * * *

152. * * * Scissors and shears, and blades for the same, finished or unfinished, valued at not more than fifty cents per dozen, fifteen cents per dozen and fifteen per centum ad valorem; valued at more than fifty cents and not more than one dollar and seventy-five cents per dozen, fifty cents per dozen and fifteen per centum ad valorem; valued at more than one dollar and seventy-five cents per dozen, seventy-five cents per dozen and twenty-five per centum ad valorem.

199. Articles or wares not specially provided for in this section, composed wholly or in part of iron, steel, lead, copper, nickel, pewter, zinc, gold, silver, platinum, aluminum, or other metal, and whether partly or wholly manufactured, forty-five per centum ad valorem.

The articles in question are made from tool steel by the process of stamping and forging, they being cleaned of the surplus metal left adhering to them after that operation. They are uniform in size and dimensions and bear in a crude way the form and appearance of unfinished scissors blades. They are not yet punched with the necessary pivot holes, nor are they true to one another, nor are they tempered, sharpened, nickel plated, colored, or polished. Nevertheless, they have been brought into a condition where their only practical commercial use or purpose is to be finished into perfect scissors blades, and this, of course, is the use for which they are designed. The complete finishing of the present articles into scissors blades requires many processes; these are said to number about 56 in all. In the course of this work the articles pass through the hands of many different workmen, adding greatly to the total cost of their manufacture. These processes, however, do not add any material to the metal frames as they now exist, nor do they take any material therefrom, for the sole purpose of altering their present scissorslike form. But by means of the additional processes just referred to the present articles are tempered, straightened, punched, nickel plated, colored, ground, polished, and fitted to one another.

It must be conceded that the crude articles now in controversy may aptly be classified either as "manufactures of metal" within the terms of paragraph 199 of the act, or as "forgings of iron and steel" within the terms of paragraph 123. The articles, therefore, would be dutiable under one of those paragraphs unless they would also come within the more specific description of "scissors * * * and blades for the same, finished or unfinished," contained in paragraph 152. In the latter event the more specific provision would of course prevail. The sole question in the case, therefore, is whether the imported articles in their present crude condition respond to the statutory designation of unfinished scissors blades. If the articles properly bear that title, then the present assessment should be affirmed.

At the trial before the board the importers submitted in evidence a number of scissors blades which are much further advanced in manufacture than the articles now in question, they having been straightened, drilled, tempered, and ground, but still requiring to be marked, scored, colored, nickel plated, edged, and otherwise treated before they are considered to be entirely finished articles. These articles were made part of the record as an illustrative exhibit in the case, and the importers undertook to prove that in the trade such articles only bear the designation of unfinished scissors blades. It need only be said, however, that the testimony contained in the record is plainly insufficient to establish any general, uniform, and definite trade usage of the term "unfinished scissors blades," and therefore that term must be given its common signification in the present case.

The decisive factor in the present case is found in the circumstance that the articles in question were brought to their present condition as part of the process of manufacturing them into finished scissors blades, and that this process has so far advanced in their case that the articles possess the elementary form and substance of scissors blades and are unsuitable commercially for any other use. The tariff act distinguishes in terms between scissors and scissors blades and expressly provides that both shall bear the indicated duty whether they be finished or unfinished as such. There must therefore come a point in the manufacturing process where in the contemplation of the act the articles become scissors or scissors blades in name and character, even though they may not yet be finished and ready for use as such. In the manufacture of the present articles that point has been reached. The numerous and important processes of manufacture through which they must yet pass are essentially finishing processes, such as do not forbid their present classification as unfinished scissors blades.

The following extract from the opinion of Judge Lacombe in the case of *Oppenheimer v. United States* (66 Fed., 52), relating to an

analogous provision for "articles of wearing apparel, manufactured in whole or in part," is in line with the foregoing conclusion:

The merchandise imported in this case is clearly within the italicized portion of this paragraph. It is made up "in part," the operation of making up having progressed so far that it is easy to identify the particular article of wearing apparel it is to be, and the materials out of which it is made being rendered, so far as the evidence shows, practically useless for any other purpose.

In the case of *United States v. Lyon & Healy* (4 Ct. Cust. Appls., 438; T. D. 33873), certain violin and cello necks manufactured from wood were in question, the competition being between the classification of "parts of musical instruments" and that of "manufactures of wood." Judge De Vries speaking for this court said:

The violin and cello necks are cut into shape, but are not polished or fitted, nor have they holes bored through them for the keys for the violin strings. They are, however, so far shaped as to indicate *per se*, as imported, their ultimate use, and that by reason of their shape and condition as imported they are unfit for any other use.

Applying these principles to the record and samples before us, and as heretofore described, it would seem that as to the violin and cello necks they should be properly classifiable as parts of musical instruments. Their physical construction is such as to plainly render them unserviceable for any other purpose and to clearly identify them and their future use as parts of musical instruments.

In the case of *Schiff v. United States* (2 Ct. Cust. Appls., 89; T. D. 31634), certain straw plateaux, slightly convex but near flat in shape, with the appearance of plain round mats of braided straw, but without a crown and untrimmed, were held by this court to be dutiable under paragraph 409, tariff act of 1897, as hats composed of straw partly manufactured and untrimmed, rather than as manufactures of straw. The court said:

The language of the paragraph provides for hats composed of straw partly manufactured but not trimmed. These straw forms or bodies are intended to be made into finished hats; they are so constructed that they may generally be blocked into hats by a process which adds no new material to them and does not substantially change them except as to shape; and they are practically useless for any other purpose except to be finished as hats.

Under the tariff act of 1897 a question very similar to the present issue was raised in the case of *Shear Co. v. United States*, decided by the board on April 8, 1904, Abstract 1011 (T. D. 25199). The following is a copy of that decision:

The merchandise was classified as unfinished scissors blades under paragraph 153, tariff act of 1897, and was claimed to be dutiable as castings under paragraph 149.

FISCHER, *General Appraiser*: The case was submitted on the record and samples, which are scissors blades apparently just as cast. They are, however, perfectly formed, and seem to require nothing but smoothing and grinding to make them complete. The provision of paragraph 153 for "blades for scissors, * * * unfinished," covers them, and is more specific than the provision in paragraph 149 for "castings * * * not specially provided for." The protest is overruled and the decision of the collector affirmed.

The reasoning upon which the foregoing decision rests commends itself as sound, and in view of the fact that the relevant provisions of the tariff act of 1909 are substantially identical with those of the act of 1897 the decision may also be regarded as having in a measure received legislative approval and adoption.

The views above expressed are not in conflict with the decision of this court in the case of *Fenton v. United States* (1 Ct. Cust. Appls., 529; T. D. 31546), which is especially cited by appellants. The articles involved in that case were so-called cork floats and the competition was between a provision for "fishing tackle" and one for "manufactures of cork." There was, however, no provision in the act for "unfinished" or "partly manufactured" fishing tackle. It appeared from the testimony that the articles in question were not yet finished as floats but required numerous processes of manufacture before they could be used as such. The court held that because of their unfinished condition the floats could not be classified as fishing tackle. In that behalf Judge Barber, speaking for the court, said:

But we do not think in its common, ordinary meaning the term "fishing tackle" includes a rod, reel, hook, or float that is not in finished condition ready for the angler's use, and the terms "parts thereof" must refer to the completed article, whatever it may be, that is also ready for use either alone or in connection with other articles of the angler's outfit.

This reasoning would not govern the present case, because the applicable provision for scissors blades expressly covers unfinished blades as well as finished ones.

In accordance with the views above expressed the decision of the board is *affirmed*.

CHRYSTAL *v.* UNITED STATES (No. 1445).¹

1. ABRASIVE.

The true, final, and distinctive purpose of an abrasive is to create new surfaces by rubbing or grinding away older ones, and not to produce friction or heat. The use of powdered glass on match heads or the sides of match boxes is not as an abrasive.

2. POWDERED GLASS NOT WASTE.

This glass might probably be regarded as a manufacture from waste, but it is not itself waste in the proper sense of the term. It was dutiable as a manufacture of glass under paragraph 109, tariff act of 1909.

United States Court of Customs Appeals, January 15, 1915.

APPEAL from Board of United States General Appraisers, G. A. 7585 (T. D. 34628).

[Affirmed.]

Allan R. Brown for appellant.

Bert Hanson, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, of counsel), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES and MARTIN, Judges.

SMITH, Judge, delivered the opinion of the court:

Powdered glass imported at the port of New York was classified by the collector of customs as a manufacture of glass not specially

¹ Reported in T. D. 35148 (28 Treas. Dec., 226).

provided for and assessed for duty at 45 per cent ad valorem under the provisions of paragraph 109, tariff act of 1909, which, in so far as pertinent to the case, reads as follows:

109. * * * And all glass or manufactures of glass or paste or of which glass or paste is the component material of chief value, not specially provided for in this section, forty-five per centum ad valorem.

The importer protested that the merchandise was dutiable at 10 per cent ad valorem either as a crude artificial abrasive, under paragraph 432, or as waste not specially provided for under paragraph 479. The provisions upon which the importer relied in his protest are as follows:

432. * * * Crude artificial abrasives, ten per centum ad valorem.

479. Waste, not specially provided for in this section, ten per centum ad valorem.

The Board of General Appraisers overruled the protest and the importer appealed.

Merchandise such as that imported is secured by grinding up waste or refuse glass and passing the resulting product over sieves. The glass, pulverized fine enough to go through the sieves, constitutes the article known as powdered glass. It appears from the testimony of the importer that powdered glass is chiefly used by manufacturers of matches as a friction material in match heads or on the sides of match boxes. It is also used for "rubbing down wood," and for the manufacture of a glass paper which serves the same purposes as emery or sandpaper.

The rule is well settled, we take it, that when articles are provided for under a tariff designation descriptive of their use, the operation of such a provision, when brought in competition with some other provision adequately describing the goods, is limited to things which are chiefly used for the purpose mentioned. *Hartranft v. Langfeld* (125 U. S., 128, 131, 133-134); *Robertson v. Edelhoff* (132 U. S., 614, 624-626); *Cadwallader v. Wanamaker* (149 U. S., 532, 539); *Walker v. Seeberger* (149 U. S., 541, 543-544); *Hartranft v. Meyer* (149 U. S., 544); *Sonn v. Magone* (159 U. S., 417, 421); *Magone v. Wiederer* (159 U. S., 555, 561-562).

Powdered glass, therefore, can not be classified under paragraph 432 unless it be chiefly used as an abrasive, and whether it is so used depends on whether it acts as an abradant and serves a real abrasive purpose when employed as a friction agency on match heads and match boxes.

In our opinion, an abrasive is a substance designed and fitted to be used for the rubbing, grinding, or wearing away of particles from the surfaces of wood, metal, stone, and other hard materials, in order to produce smoothness, a polish, an edge, or other desired modifications of the surface, or a reduction in the dimensions of the thing subjected to the action of the abradant. The true, final, and dis-

tinctive purpose of an abrasive is not to produce friction or heat but to create new surfaces by rubbing or grinding away older ones. Of course, friction is a necessary consequence of rubbing or grinding and heat is the necessary outcome of friction, but neither effect represents the purpose to be accomplished by an abrasive, and at least one of them is generally regarded as a difficulty to be minimized rather than a result to be achieved in the use of abrasants.

Powdered glass on match heads or on the sides of match boxes has no real or ultimate purpose other than the sudden development of a degree of heat sufficient to ignite the inflammable ingredients of which the match head is composed, and therefore we think its use in that behalf can not be considered as abrasive. When utilized to "rub down" wood, metal, stone, or like substances, or in the manufacture of paper designed for that object, and similar to emery or sandpaper, powdered glass is employed as an abrasant. Inasmuch, however, as it is not chiefly used for those purposes, but as a friction material for the heads of matches or sides of match boxes, as shown by the testimony, its chief use is not that of an abrasant, and consequently it does not fall within the intent or meaning of paragraph 432, as contended by the importer.

It does not appear that the term "abrasive" is used by the trade of the country in the buying or selling of goods or that powdered glass is bought or sold at wholesale as an abrasive, and we must, therefore, decline to hold that it has received a commercial meaning which differs from its ordinary signification, and which is not descriptive of use.

As powdered glass is made by grinding up and sieving broken bottles and refuse glass, it might probably be regarded as a manufacture from waste, but it is not itself waste in the proper sense of the term, and is therefore not dutiable as waste under paragraph 479, as claimed in the protest.

The decision of the Board of General Appraisers is *affirmed*.

CONE *et al.* v. UNITED STATES (No. 1457).¹

1. GRASSES CUT TO LENGTHS.

The report of the appraiser that the grasses of the importation were cut to lengths to be used in the manufacture of brushes ready for use is supported by the record.

2. GRASSES, DRESSED.

The material is prepared for a definite use and is ready at hand for its ultimate use in the manufacture of specified articles and according to the lexicons these facts make the material "dressed." It is held this conforms to the statute and that the merchandise was properly assessed under paragraph 480, act of 1909.—United States v. Continental Color & Chemical Co. (2 Ct. Cust. Appls, 165; T. D. 31679), United States v. Danker & Marston (2 Ct. Cust. Appls, 522; T. D. 32251), Schoenemann v. United States (119 Fed., 584) distinguished.

¹ Reported in T. D. 35149 (28 Treas. Dec., 228).

United States Court of Customs Appeals, January 15, 1915.

APPEAL from Board of United States General Appraisers, Abstract 36238 (T. D. 34677)
[Affirmed.]

Allan R. Brown for appellants.

Bert Hanson, Assistant Attorney General (*William A. Robertson*, special attorney, on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

The merchandise in this case consists of vegetable fibers which are claimed to be free of duty under paragraph 578 of the act of 1909. The assessment was under paragraph 480 for nonenumerated manufactured articles. The report of the appraiser was that "the merchandise consists of piassava, a vegetable fiber, dyed and dressed, used in the manufacture of brushes, returned for duty as a non-enumerated partially manufactured article." In answer to another protest, the merchandise was referred to as "vegetable fiber cut into uniform lengths, dressed and dyed and bunched, used in the manufacture of brushes." The samples all present a similar appearance, and are probably of the same material. The testimony of a witness introduced by the importer is to the effect that the articles are cut to specified length and also dyed, and that they are sorted and bunched according to certain lengths. The importer states his contention to be that cutting, sorting, and bunching according to lengths are not manufacturing processes. As to dyeing, it is further contended that it is immaterial whether the facts in the record as to the presence or absence of coloring matter establish that the fibers be colored or dyed, since paragraph 578 says nothing about dyeing, and that the presence of an infinitesimal amount of unidentifiable coloring matter present in a portion of the samples does not indicate that the fibers are dyed, and does not justify the conclusion that the fibers are dressed or manufactured.

The correctness of the appraiser's report does not appear to be seriously questioned. An examination of the exhibits would seem to support the report. The importer introduced an illustrative exhibit, and stated, "I testify that all the fibers in these 14 cases are identical with this sample." This sample clearly demonstrates that the fiber had been cut to lengths for use in the manufacture of brooms. It is true the importer also testified that if manufactured into brooms and brushes it has to be cut off—trimmed—after it is put into the handle. But the evidence shows that while some of the exhibits show that it has not been cut to exact lengths, in some of the others in evidence it is often cut more accurately to certain lengths than in the illustrative exhibit referred to. It may fairly be said, therefore, that the report of the appraiser that the grasses

were cut to lengths to be used in the manufacture of brushes and bunched ready for use is supported by the record.

That a very large proportion of this material has also been dyed is fairly established by the testimony of the chemist. But as a portion is not so dyed, the question is before the court for determination as to whether the selection of these grasses, cut to lengths and bunched ready for use in the manufacture of an article, is a dressing or manufacture within the meaning of the paragraph in question. This paragraph reads as follows:

578. Grasses and fibers: Istle or Tampico fiber, jute, jute butts, manila, sisal grass, sunn, and all other textile grasses or fibrous vegetable substances, not dressed or manufactured in any manner, and not specially provided for in this section.

As stated in the opinion of the board in this case, there is some conflict in the decisions of the board on merchandise that is, if not identical, very similar to that under consideration. This is explained by the fact that records are often incomplete. But we have here presented the question as to whether such treatment as is shown in this case—namely, cutting, sorting, and packing in bundles ready for ultimate use in the manufacture of brushes or brooms—is a dressing or manufacture within the meaning of this paragraph.

We had before us similar goods in *United States v. Flatt* (5 Ct. Cust. Appls., 210; T. D. 34379). That case dealt with the subject of cocoa fiber, and we had under consideration paragraph 540 of the free list for “cocoa, or cacao, crude, and fiber, leaves, and shells of.” The appraiser reported the article to be “cocoa fiber, dressed, cut into uniform lengths and bunched, ready for use in the manufacture of brushes.” This case was determined upon the report of the appraiser, but as no evidence appeared to the contrary, it was held that the board was bound to follow the report of the appraiser. It is not therefore an authority for or against the decision in the present case.

It is to be noted, however, that there is a distinction between the paragraph there considered and the one here under consideration, and the first inquiry is whether these goods are dressed within the meaning of this paragraph. The word “dress” or “dressed” as applied to such articles must relate to some form of preparation. The question as to the extent of that preparation is the one for solution here.

In the *New English Dictionary* (vol. 3) “dress” is defined as follows:

1. To make straight or right; to bring into proper order; to array, make ready, prepare, tend. * * * 5. To make ready or prepare for any purpose; to order, arrange, draw up.

In the *Standard Dictionary*:

5. (3) To reduce to proper shape for use. * * *

In the Century Dictionary:

5. (c) To make fit for the purpose intended by some suitable process, as, to dress beef for market: to dress skins; to dress flax or hemp.

In Webster's New International Dictionary:

1. To make or set straight or right; * * *. 2. To put in good order; to make ready: to prepare for use or service; * * *.

We are convinced that the treatment to which this material has been subjected brings it well within these definitions. The material is prepared for a definite use, and is ready at hand for its ultimate use in the manufacture of specified articles.

While the word "dressed" has not been construed often, the case *In re Robson*, G. A. 5520 (T. D. 24860) would appear to be in point. The merchandise is there described as Bahia piassava and Para piassava, and the report by the local appraisers was:

In this case it is not crude or unmanufactured (in which condition it is generally sold in large bundles of irregular lengths), but has been assorted or dressed, and afterwards cut into uniform lengths of 6 inches and bunched, in which shape it is prepared for brush-makers' use. It being therefore partially manufactured and not specially provided for, it was, in our opinion, properly returned under section 6.

It was there held that the merchandise was found to be similar in condition to kittul fiber, covered by *In re Wilkens* (T. D. 29773) and affirmed in *Wilkens v. United States* (84 Fed., 152). The opinion in the case T. D. 24860 appears to have been based upon the report of the appraiser, which evidently treats "assorted" and "bunched" as synonymous with "dressed." See also *In re Harvey*, G. A. 3397 (T. D. 16969).

The cases cited by the importer to show that the sorting or bundling of goods does not make a material manufactured do not meet the issue here. Without affirming or denying the contention that such process is not in any sense a manufacture, it is enough for the purpose of this case to find that that process constitutes a dressing.

It is suggested in the brief of counsel that this is a crude material for the uses to which it is to be put, and cases are cited to the point that an article may be a crude material if in a crude state in relation to the use to which it is to be put. Two of our own decisions are cited—the case of *United States v. Continental Color & Chemical Co.* (2 Ct. Cust. Appls., 165; T. D. 31679) and *United States v. Danker & Marston* (2 Ct. Cust. Appls., 522; T. D. 32251). These cases are distinguishable from the instant case on like grounds. In each of the cases the provision construed was "articles in a crude state used in dyeing or tanning * * *." There was no provision corresponding to the clause of the statute here involved, which excludes "articles dressed or manufactured in any manner." The case therefore dealt with the word "crude." It was held that this term might include an article the result of manufacture where it appeared that

such article was unfit for the purpose intended, namely, dyeing or tanning, in its state as imported, but must be further submitted to elaborate processes before being adapted to such intended use. It may be noted that the case of *Fenton v. United States* (1 Ct. Cust. Appls., 529; T. D. 31546) illustrates the true distinction between crude articles and a manufacture of such material.

It is difficult to see how the principle invoked aids the importer. The article here is dressed for its ultimate use and it is not a crude material for the use to which it is to be put in the sense that it requires any further treatment, as the testimony of the importer shows that the most that is to be done in the way of trimming this material is to cut off the ends after it has been placed in the handle of the broom or brush. Indeed, it would seem impossible to fit it more completely than is done in the case of the most finished of these products.

Reliance is placed upon the case of *Salomon v. United States* (2 Ct. Cust. Appls., 431; T. D. 32196). That case is clearly distinguishable from the present. The merchandise was there described as crude jute waste, so called, which consisted of the broken fibers of undressed raw jute which are rejected by the carding machine in the first process of manufacture to which undressed jute is subjected. The evidence disclosed that in carding raw jute the carding machine picks up the long filaments of the jute and that the short fibers and those which are inferior are rejected by the pins of the machine. This rejected substance was the substance there dealt with. It was said:

It is inferior to the parent substance, however, in quality. But the evidence discloses that it may be devoted to the same uses to which the substance resulting from the first carding is devoted.

It further appeared that before it could be put to the use of spinning it must again be recarded and the product of this recarding is that which is used in spinning.

As to the question whether it would be dressed, it was said:

The evidence discloses that the first process of carding is not with the purpose of getting this substance. The carder does not desire to get any. But it comes about from the presence of inferior fibers. It is a by-product and not the substance sought. * * * But what is more significant is the fact that before it can be devoted to the same purpose that the superior quality is, namely, spinning, it must be subjected to a new process of carding and treated in precisely the same manner that the native substance is required to be treated.

Not so in the present case. The imported merchandise here is ready for its use in the manufacture of brooms or brushes.

Importer's counsel also relies upon the sea-shell cases, citing *Schoenemann v. United States* (119 Fed., 584). In that case the court was dealing with a provision for free entry of "shells not sawed, cut, polished, or otherwise manufactured, or advanced in value from the

natural state." The shells had been washed with water and chloride of lime, and they were held to be entitled to free entry notwithstanding. It was said:

Sea shells are the hard, organized substances forming the exterior covering and protection of certain marine animals, and these hard, bony coverings are not changed from their natural state by having these animals and the adventitious and foreign matter clinging to them removed. They are no part of the shell, and the natural state of the shell remains after this removal takes place. It would be as reasonable to say that the natural state of the shell existed only when the marine animal which it contained and protected was present as to say that there was a change from the natural state wrought by cleansing it from foreign substances which were no part of it.

It is obvious that this case is not an authority upon the question here discussed, but had the statute there under consideration, instead of restricting shells to those "not sawed, cut, polished, or otherwise manufactured," included the words "or dressed," quite a different question would have been presented for the court's consideration.

We think it should be held in the present case that these articles, prepared as they are, are dressed, within the meaning of the statute, and that the decision of the board should be *affirmed*.

SEMON BACHE & Co. v. UNITED STATES (No. 1409).¹

TOWEL RODS COMPOSED OF MOLDED GLASS.

The board found from the testimony the merchandise was glass rods or glass and not fusible enamel. There is such a substantial conflict in the testimony that the court does not feel justified, under its well-established rule, in reversing the finding of the board.

United States Court of Customs Appeals, February 3, 1915.

APPEAL from Board of United States General Appraisers, G. A. 7556 (T. D. 34377).

[Affirmed.]

Walter Evans Hampton for appellants.

Bert Hanson, Assistant Attorney General (*Leland N. Wood*, special attorney, on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

DE VRIES, Judge, delivered the opinion of the court:

This appeal concerns an importation of rods from Austria at the port of New York and by the appraiser there reported as "towel-rack rods composed of molded glass." They were held and returned as dutiable by the collector at that port as manufactures of glass under the provisions of paragraph 109 of the tariff act of 1909, which, in its relevant parts, reads:

109. * * * All glass or manufactures of glass or paste or of which glass or paste is the component material of chief value, not specially provided for in this section,
* * *

¹ Reported in T. D. 35150 (28 Treas. Dec., 233).

This decision of the collector was duly contested by the importers, who make claim that the merchandise is fusible enamel, and as such properly dutiable under the provisions of paragraph 110 of the same act. The board overruled the contention of the importers, and this appeal brings here for review that decision of the board.

The rods were all invoiced as glass rods, but some of them, the assessment of duty upon which was not contested, were more uniform in length and width and straighter than those the classification of which is contested. These more uniform ones seem to have been invoiced as per length, whilst those the subject of this controversy were invoiced according to weight. They were manufactured by one Reidel in Austria, who was a glass manufacturer, were invoiced as "Weisse Stangen," or "glass rods." The importing firm deals in glass rods, plate glass, window glass, and cylinder glass. They were sold to one Foix, who testified that his business was the manufacture of glass goods, bull's-eyes, buttons, and other novelties, and he called them, in adverting to the merchandise in his testimony, "glass rods," and stated that he purchased them for the purpose of and used them in the manufacture of glass buttons, etc.

There is much testimony in the record on behalf of both the Government and the importers. The Board of General Appraisers, after carefully reviewing this testimony, found that the merchandise was glass rods or glass and not fusible enamel. There is such a substantial conflict in the testimony that the court does not feel justified under its well-established rule in reversing the finding of the board.

Moreover, a very careful review of all the evidence appearing in the record convinces the court that were the question one *de novo* here unsupported by a determination of the facts by the board this court would not feel justified in holding that the record was one such as would justify a reversal of the decision of the collector.

It seems plain to us that this merchandise, made in the same factory and presumably at the same time as the other rods upon the invoice, consists simply of the inferior or second-grade goods of the same output, and that though invoiced per pound and purchased at a less rate than the superior results of the manufacture, they are, nevertheless, nothing more nor less than glass, and were purchased and sold and used as glass. The only testimony in the record which to any substantial degree seriously conflicts with this conclusion is that of the chemist who made analyses of certain samples. We think, however, that whatever force this testimony may have it is greatly neutralized by the failure in this record to connect positively and satisfactorily the samples analyzed by the chemist with the importations here in question, or at least to show an identity or similarity of substance.

It may be noted in passing that the provision under which duty was laid provides for glass as well as manufactures of glass, and that even were it true that these importations do not amount to a manufacture of glass, they were nevertheless glass.

The decision of the Board of General Appraisers is *affirmed*.

LANDAY BROS. v. UNITED STATES (No. 1431).¹

NEEDLES FOR PHONOGRAPHS.

Whether equipped with records of one kind or another, a phonograph without a needle capable of being fitted to it and of following the cuts or undulations of the records would not serve the purpose for which it was made and would not be a complete machine. The needles stand for tariff purposes on a footing with the records themselves.

United States Court of Customs Appeals, February 3, 1915.

APPEAL from Board of United States General Appraisers, G. A. 7551 (T. D. 34352).

[Affirmed.]

Allan R. Brown for appellants.

Bert Hanson, Assistant Attorney General (Frank P. Wilson, special attorney, on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

SMITH, Judge, delivered the opinion of the court:

So-called needles for phonographs were classified by the collector of customs at the port of New York as parts of gramophones and assessed for duty at 45 per cent ad valorem under the provisions of paragraph 468 of the tariff act of 1909, which said paragraph is as follows:

468. Phonographs, gramophones, graphophones, and similar articles, or parts thereof, forty-five per centum ad valorem.

The importers protested that the goods were manufactures of wire, dutiable either at 2 cents per pound, $2\frac{1}{2}$ cents per pound, $2\frac{3}{4}$ cents per pound, or at 35 per cent ad valorem, or at those rates plus two-tenths of 1 cent per pound, or at 40 per cent ad valorem under that part of paragraph 135 of the tariff act of 1909, which reads as follows:

135. Round iron or steel wire, not smaller than number thirteen wire gauge, one cent per pound; smaller than number thirteen and not smaller than number sixteen wire gauge, one and one-fourth cents per pound; smaller than number sixteen wire gauge, one and three-fourths cents per pound: *Provided*, That all the foregoing shall pay duty at not less than thirty-five per centum ad valorem; * * * on iron or steel wire coated by dipping, galvanizing or similar process with zinc, tin, or other metal, there shall be paid two-tenths of one cent per pound in addition to the rate imposed on the wire of which it is made: *Provided further*, That articles manufactured wholly or in chief value of any wire or wires provided for in this paragraph shall pay the maximum rate of duty imposed in this section upon any wire used in the manufacture of such articles and in addition thereto one cent per pound: *And provided further*, That no article made from or composed of wire shall pay a less rate of duty than forty per centum ad valorem; * * *.

¹ Reported in T. D. 35151 (28 Treas. Dec., 235).

The Board of General Appraisers overruled the protest and the importers appealed.

It appears from the record that the goods described in the protest are made of steel wire and are designed to be used as complementaries of the phonograph in the reproduction of vibrations caused by sound and recorded on disks of suitable composition. The needles are attached to the reproducer of the phonograph, and when let down on the disk, to which a circular motion has been given, trace out the recorded vibrations and thus reproduce the sound which such vibrations represent. The metal points or needles may be used on any style of phonograph, except those fitted with cylinders of wax or with records having an undulating instead of a lateral cut. Phonographs furnished with records having an undulating cut require a permanent needle, shod with a precious stone, while those provided with records having a lateral cut are supplied with needles either of steel or wood. Needles pointed with precious stones may be used indefinitely. Steel needles, however, due to the hardness of the records on which they are employed, are, as appears from the evidence, worn away at the point by a single service, and therefore can be used but once. Whether wooden needles are any more durable than steel needles the testimony does not disclose, but for the purposes of the case we assume that they are not. Apparently concerns which manufacture phonographs do not manufacture needles, and those which manufacture needles do not manufacture phonographs. It also seems that phonograph needles are neither bought nor sold by importers with the machine. From this state of facts the importers' counsel deduces that the goods under consideration are mere accessories, not parts of the phonograph, and consequently not dutiable as assessed.

We do not think that the facts stated, whether considered separately or together, warrant the conclusions reached. Whether equipped with records of one kind or another, a phonograph without a needle of some kind capable of being fitted to it and of following the cuts or undulations of the records would not serve the purpose for which it was made, and consequently could not be regarded as a complete machine. The needle is a *necessary* part of the reproducer; the reproducer is an indispensable and integral part of the phonograph, and from that it would seem to follow that the needle is an essential part of the machine and not a mere aid, auxiliary, or accessory which might be omitted without rendering the whole device unserviceable. Whether the essential constituents that go to make up mechanical contrivances are made by different manufacturers, or are bought and sold by the importer as separate entities, or are standardized for all machines of the same class, or are quickly expended and frequently replaced, does not alter their status as parts of the mechanism, and they are just as much parts as if they had been assembled into the completed machine.

The claim that the relation of the needle to the phonograph is on a parity with that of the cartridge to the rifle is not apt to the purpose, for the reason that the popular conception of a completed rifle excludes the cartridge, whereas the common idea of a complete phonograph necessarily implies that it is equipped with a needle to make it work.

Abstract 25775 (T. D. 31675), relied upon by the appellants, is not in point. That case raised the question of whether 60 dozen needles for embroidery machines were entitled to admission free as *embroidery machines* under paragraph 197 of the tariff act of 1909 or dutiable as needles for knitting or sewing machines under paragraph 164 of the same act. Paragraph 197 accorded free entry to embroidery machines, but made no provision for the free entry of parts of embroidery machines. In paragraph 164 crochet, tape, knitting, and all other needles, not specially provided for, as well as bodkins of metal, were expressly enumerated and subjected to a duty of 25 per cent ad valorem. The needles which were there the subject of controversy were imported at the same time as the embroidery machines for which they were intended, but were packed separately. The board declined to accept the needles as *assembled* parts of the embroidery machines, and therefore regarded needles and machines as separate units or entities. As needles could not be classified as embroidery machines, and as paragraph 197 made no provision for parts of such machines, the exclusion of the needles from the operation of the paragraph naturally followed.

In our opinion the goods involved in this appeal are just as much parts of phonographs as are the records to which such needles are applied in order to reproduce sounds and are subject to the same tariff classification.

The decision of the Board of General Appraisers is *affirmed*.

UNITED STATES v. FEARON DANIEL CO. (No. 1421).¹

CHINA GOAT HAIR:

The question for determination is almost entirely one of fact, and on a review of the testimony it is held the merchandise is China goat hair, not wool, and as such was entitled to free entry under paragraph 583, tariff act of 1909.

United States Court of Customs Appeals, February 12, 1915.

APPEAL from Board of United States General Appraisers, Abstract 35843 (T. D. 34548).
[Affirmed.]

Bert Hanson, Assistant Attorney General, for the United States.

Curie, Smith & Maxwell (Thomas M. Lane of counsel) for appellee.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MARTIN, Judge, delivered the opinion of the court:

The importation involved in this case consisted of two lots of merchandise, one comprising 60 bales marked "H. K. S. M.," the other

¹ Reported in T. D. 35152 (28 Treas. Dec., 237).

comprising 59 bales marked "G. H." They were invoiced together as "animal hair," and free entry therefor was claimed by the importers under paragraph 583 of the tariff act of 1909.

The appraiser, however, reported that the merchandise was in fact "hair of China sheep, wool of the third class," valued at less than 12 cents per pound, and therefore dutiable at the rate of 4 cents per pound under paragraph 370 of the act. The collector accordingly refused free entry to the merchandise and assessed the same with duty at the rate of 4 cents per pound.

The importers filed their protest against the assessment, claiming the merchandise to be hair of the China goat and therefore entitled to free entry under the provisions of paragraph 583, *supra*.

The following is a copy of the paragraphs in question:

370. On wools of the third class and on camel's hair of the third class the value whereof shall be twelve cents or less per pound, the duty shall be four cents per pound. On wools of the third class, and on camel's hair of the third class, the value whereof shall exceed twelve cents per pound, the duty shall be seven cents per pound.

583. Hair of horse, cattle, and other animals, cleaned or uncleaned, drawn or undrawn, but unmanufactured, not specially provided for in this section; and human hair, raw, uncleaned, and not drawn.

The protest was submitted upon evidence to the Board of General Appraisers and was sustained as to both lots of the importation. The Government thereupon appealed from the board's decision in so far as the same related to the lot of 60 bales marked "H. K. S. M." That part only of the importation is thus brought before the court for review.

From the foregoing statement it readily appears that the present question is almost entirely one of fact, the importers claiming the merchandise in question to be China goat hair, while the Government claims it to be China sheep wool. It is conceded by the Government that the merchandise would be entitled to free entry if shown by the testimony to be composed entirely of China goat hair; on the other hand, the importers concede that the merchandise would not be free if composed of China sheep wool.

At the trial before the board the importers examined five witnesses, namely, Joseph H. Kenworthy, who had been in the business of buying and selling wool and hair at wholesale in this country for 25 years; Walter H. Mote, who had been a broker engaged in selling wool and hair at wholesale in this country for 12 years; William D. Oelbermann, who had been in the wool and hair business in this country for 13 years, buying and selling the same at wholesale, dealing at present in China goat hair; Emil Erlanger, who had been engaged for some years in importing merchandise from China, including China wool, goat hair, and goatskins with hair upon them, and who had been in China engaged in the export business for the preceding 6

years; and Victor G. Hofbauer, who had been a wool broker in this country for 5 years, engaged in buying and selling wool and hair, including China wool and China goat hair, in wholesale quantities. Nothing appears in the record to reflect upon the good faith or intelligence of any of these witnesses, although some of them had been interested as brokers in the present importations.

The testimony of these witnesses is to the effect that China goat hair, off the skin, has not been a subject of large or frequent importations into this country; that goatskins are generally exported from China with the hair on; that goats are raised in China for their skins and that the hair is in the nature of a by-product. The witnesses seem to have been well qualified to speak as experts upon the subject in hand and their testimony strongly sustained the claim that the merchandise in question was China goat hair and was not wool from the China sheep. According to their testimony the two separate lots in question before the board were essentially similar in character. They testified that hair from the China goat lacks the oiliness and kinkiness of China sheep wool, and is coarser, harsher, straighter, and drier than the latter. It is also incapable alone of the same uses as wool in respect to carding, combing, and spinning. It also appears from their testimony that upon some goatskins there is a certain quantity of new or immature hairs, forming a woolly undergrowth, which in time become straight and long like the other hairs, and are not wool either in fact or in commerce. The witnesses identified a small part of the importation as belonging to that class of hairs.

On the other hand, the Government also examined five witnesses upon the issue before the board. Four of these, namely, William A. Quinton, Joseph Sievers, James McKissock, and William R. Cahill, were official wool or hair examiners at the ports of Boston, New York, or Philadelphia. The four examiners testified that the merchandise in question, including both lots alike, was not China goat hair, but was from the China sheep. According to their testimony China sheep of certain kinds or conditions produce a considerable quantity of hair of a low grade which is not classifiable as wool, the same sheep producing also at the same time a greater or less quantity of finer hairs such as are wool. According to their testimony, taken together, the present importation, including both lots alike, was composed mostly of such China sheep hair with a small percentage, possibly 10 per cent, of such China sheep wool intermingled therewith. These two articles, according to the witnesses, were inseparably intermingled, and the entire merchandise was therefore passed as wool, although the hair component if imported alone might have been entitled to free entry.

The following extracts are taken from the testimony of Examiner Joseph Sievers, who passed the present merchandise:

Q. Look at Exhibit 2 and please state whether your examination enables you to say if the stuff is hair or wool?—A. It contains some wool.

Q. How much?—A. It is impossible to state.

Q. Did you return the invoice in question?—A. I did; yes, sir.

Q. As what?—A. As wool.

Q. You speak of the merchandise as being a mixture—a mixture of what?—A. It is so poor—

Q. I say, which prevails, the wool or the hair, in the mixture?—A. The hair is mixed through the wool.

Q. I say, which prevails in the mixture, wool or hair?—A. Wool.

Q. Do you receive importations of China goat hair from time to time?—A. That is not my line.

Q. Does it come before you for examination?—A. Excepting when the regular examiner is away; it does sometimes.

Q. And China wool comes to you in any event?—A. Yes.

* * * * *

By Mr. LAWRENCE: Is there any doubt in your mind that the wool is the prevailing content in that mixture?—A. Well, wool isn't the largest per cent; but wool rules, because there is wool in it.

Q. What do you mean by that?—A. I mean to say that these—that there is a small percentage of wool showing through that shipment.

By General Appraiser McCLELLAND: Is there more hair than wool?—A. More of what we call hair than wool; yes, sir.

Q. How much more, would you say?—A. Oh, that—I don't know.

Q. Approximately?—A. Well, 10 or 15 per cent of wool; it would be impossible to say; it would be impossible to take it out and make your estimate.

* * * * *

Q. Are you familiar with the characteristics of China hair?—A. I certainly am.

Q. How have you acquired that familiarity?—A. Because I have handled it.

Q. You mean in a commercial way, or as an examiner, or both?—A. As an examiner.

Q. Do you find that China hair as a rule possesses hair the quality of this merchandise?—A. I find China hair to be contained in that sample; yes.

Q. Does this sample possess the qualities that China hair does not possess?—A. It does.

Q. What are those?—A. That is the wool part.

Q. Describe the qualities again.—A. Wool shows as being bulkier and softer.

* * * * *

Q. Will you pick out for us the quantity of what you say is wool?

(The witness picks out samples of wool.)

Q. This article that you have picked out [Exhibit 1], is the article you referred to as wool, is it?—A. Yes, sir; it comes right along as China wool.

Q. That you say is scattered through this shipment?—A. Yes, sir.

General Appraiser McCLELLAND. Put it in an envelope.

Mr. LANE. I will ask to have it marked "Illustrative Exhibit C."

(Sample is marked "Illustrative Exhibit C," etc.)

Q. Can you state from any examination that you have made that there is in these exhibits over 10 per cent of the article like Exhibit C?—A. That would be simply a physical impossibility to say.

Q. You conceded that in quantity the great majority of these exhibits, or the great preponderance of these exhibits, is made up of what is concededly hair?—A. Concededly hair.

Q. Isn't it true that all hair, all goat hair, contains more or less of a woolly undergrowth?—A. No, sir.

The following extracts are taken from the testimony of Examiner William R. Cahill:

Q. I believe you said that the growth on sheepskins was made up of more or less hair and wool?—A. Yes, sir.

Q. And as the sheep deteriorates the hair becomes more and more common, does it?—A. Yes, sir.

Q. When you get in the realm of the mocha sheep you get a sheep that contains hair on its pelt, don't you?—A. The mocha sheep is principally hair.

Q. Made up principally of hair?—A. Yes, sir.

Q. When you get into the low grade China sheep, you get pretty well into the hair class?—A. A good deal of hair of a very low grade.

Q. When you get China goat sometimes it is rather difficult to tell the difference between China goat and China sheep; they merge very closely?—A. Not at all.

Q. Have you ever been in China?—A. No, sir.

Q. Never seen the China goat on its native heath?—A. No, sir; but I have seen skins with the wool on.

Q. You know, I believe, and would admit that China goat hair frequently contains a woolly growth, doesn't it?—A. An undergrowth.

Q. A woolly undergrowth?—A. A woolly undergrowth, which resembles cashmere; in fact it is cashmere.

Q. Very fine?—A. Very fine.

* * * * *

Q. You have admitted that there is considerable hair that grows on the sheep?—A. Oh, yes.

Q. That being so, and sticking to your hypothesis that this grew on a sheep's back, do you deny that there is considerable hair in these samples?—A. Certainly, and that very hair is what fools a great many who are not experts; they think it is all hair.

Q. Isn't it true that most of these samples as they lie there on the table offering them as a commercial proposition, is hair?—A. No; it is wool as a commercial commodity.

Q. Then keeping in mind this distinction that you have drawn between sheep hair and sheep wool, isn't the greater quantity of staple in those samples what you call sheep hair?—A. Well, I will admit that a majority of the fibers there, if they did not grow on sheep, might be considered hair, but I have never seen—I want to correct myself to you—I have never seen an importation of sheep's hair that don't separate it from the wool.

As is stated above, four of the five witnesses examined by the Government were official examiners of merchandise. The fifth witness was James Fee. This witness had been for 17 years the wool buyer for a large carpet manufacturing company in this country, and had bought large quantities of China hair and wool. He had bought the lot of 60 bales now in controversy, the same being sold and billed to him by the importers as China sheep's wool. The witness furthermore testified from his own knowledge and inspection that the article in question was wool.

In rebuttal of the foregoing statement concerning the sale and invoice of the merchandise as sheep's wool, the witness Mote testified that the lot had in fact been quoted and sold to the carpet manufacturing company upon sample and by mark only—namely, "H. K. S. M., 60 bales"—and not under the name either of goat hair or sheep's wool; but afterwards, when the bill and sale notes were made out, he designated the article therein as sheep's wool because of the circumstance that the manufacturing company were in general buyers of wool, and that hair was used as an adulterant only in the manufacture of carpets.

The testimony contained in the record is somewhat voluminous and conflicting, and it is not pretended that the foregoing outline is exhaustive; nevertheless it fairly indicates the grounds upon which the decision of the present issue should be placed. For the evidence considered together makes it appear probable that the merchandise in question in fact consisted of China goat hair, and that the percentage of woolly hair observed therein was simply the undergrowth of immature hair which naturally appears to a greater or less extent in such merchandise. Such undergrowth, although it resembles wool, would not justify the assessment of the merchandise as such. It is true that the present lot of merchandise was billed to a buyer as wool, but the explanation of that fact given by the witness Mote is persuasive. Moreover, if the merchandise was in fact goat hair, a subsequent sale and delivery of part of the importation as wool would not alone prove a commercial designation of the article as wool; nor under the circumstances of this case would it estop the importers from claiming and proving the real character of the importation. Furthermore it appears by uncontradicted testimony that the other lot of merchandise covered by the protest was sold by the importers by sample, number, and marks only; that the purchaser had bought it knowing it to be hair; and it sufficiently appears that the two lots of merchandise, while differing somewhat in value, were identical in character in all substantial particulars. It may also be observed that the testimony of the witness James Fee is somewhat obscured by the fact that he testified generally that the lot now in question was composed of wool, whereas the testimony of the witnesses, including that of the examiners Sievers and Cahill, conclusively shows that the greater bulk of it was concededly hair, and that only a small percentage of it would in fact have been regarded as wool.

The foregoing appraisal of the evidence tends to sustain the conclusion reached by the board. The decision is therefore sustained.

Affirmed.

TUSKA, SON & Co. v. UNITED STATES (No. 1438).¹

PLATED WITH GOLD OR SILVER.

The term "plated with gold or silver," when used without limitation, signifies that the given articles are coated with gold or silver by any one of the several known processes which are employed to cover or coat such articles with a layer of gold or silver. It signifies a final condition rather than the process by which the condition was produced. The articles here in question held to be "plated with gold or silver."

United States Court of Customs Appeals, February 12, 1915.

APPEAL from Board of United States General Appraisers, G. A. 7587 (T. D. 34651).

[Affirmed.]

McLaughlin, Russell, Coe & Sprague for appellants.

Bert Hanson, Assistant Attorney General (*Martin T. Baldwin*, special attorney, of counsel), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MARTIN, Judge, delivered the opinion of the court:

The merchandise in this case consists of certain trays, boxes, picture frames, etc., composed of antimony and covered with a thin film or coating of gold or silver.

The collector assessed the same with duty at the rate of 50 per cent ad valorem as articles or wares plated with gold or silver under the first clause of paragraph 167 of the tariff act of 1913.

The importers filed their protest against the assessment, denying that the articles in question were plated with gold or silver, and claiming assessment thereon at the rate of 20 per cent ad valorem under the last clause of the same paragraph.

In the protest the importers also claimed a discount of 5 per cent upon the assessed duties under section 4, paragraph J, subsection 7 of the act, alleging that the merchandise in question was imported in vessels of the registration of the United States or of certain named treaty nations. No evidence, however, was submitted to the board in support of this latter allegation, and because of that fact it is assumed that the claim for a discount of 5 per cent was waived in the present case.

The following is a copy of paragraph 167 of the tariff act of 1913:

167. Articles or wares not specially provided for in this section; if composed wholly or in part of platinum, gold, or silver, and articles or wares plated with gold or silver, and whether partly or wholly manufactured, 50 per centum ad valorem; if composed wholly or in chief value of iron, steel, lead, copper, brass, nickel, pewter, zinc, aluminum, or other metal, but not plated with gold or silver, and whether partly or wholly manufactured, 20 per centum ad valorem.

¹ Reported in T. D. 35153 (28 Treas. Dec., 243).

From the foregoing statement it readily appears that the sole question in the present case is whether the imported wares are plated with gold or silver.

As already stated, the articles in question are composed of antimony and are covered with a thin coating of gold or silver. It appears from the testimony that this coating was superimposed upon the articles by means of a process of chemical deposition. The articles were first formed of antimony; they were then immersed in a solution of copper through which an electric current was circuited, by which means they were electroplated with a thin film of copper. They were next either dipped in or washed with a solution composed of cyanide of potassium, water, and silver or gold. This was done without the intervention of an added electric current. As a result of the dipping or washing process the articles became coated with a thin layer of silver or gold; they were then treated to a coating of varnish. This process, which apparently depends upon chemical reaction alone, produces but a cheap and imperfect covering of the underlying article, graduated, however, by the strength of the solution and the period of immersion. According to the testimony a heavier and more durable coating may be produced by immersing the given article in a solution like that above described and permitting it to remain there a short time while an electric current is conducted through the solution. This results in an electrical decomposition of the solution and a consequent deposition of the one metal upon the other in greater volume and with a more permanent union, although in this case also the thickness of the coating depends to some extent upon the strength of the solution and the period of immersion. This latter process is the one now commonly adopted in the manufacture of substantial and durable plated ware. The importers contend that the term "plated with gold or silver," as used in paragraph 167, should be construed with reference to the foregoing facts and that a proper construction would exclude from its purview the cheaper and thinner coating which is produced by chemical deposition alone.

The record contains some testimony concerning a trade usage of the terms in question, but no peculiar commercial use thereof was established. The case therefore stands upon the common and usual signification of the words "plated with gold or silver," and the following authorities will assist in ascertaining this common meaning:

Century Dictionary:

Plate.—To overlay or coat with silver, gold, or other metal; specifically, to attach a permanent covering or film of one metal to (the surface of another). * * * Chemical plating or dipping, a process performed in some cases by the mere immersion of one metal in a hot or cold solution of some salt of another metal. * * *

Plating.—The art or operation of covering articles with a thin coating or film of metal, especially of overlaying articles made of the baser metals with a thin coating

of gold, silver, or nickel. It is effected in various ways; sometimes the plating metal is attached to and rolled out with the other metal by pressure; sometimes the one metal is precipitated from its solution upon the other, electrochemical decomposition being now much employed for this purpose.

Nickel plating.—The process of covering the surface of metals with a coating of nickel, either by means of a heated solution or by electrodeposition.

Webster's Dictionary:

Plate.—To cover or overlay with gold, silver, or other metals, either by a mechanical process, as hammering, or by a chemical process, as electrotyping; said especially of overlaying with silver.

Standard Dictionary:

Plating.—The act or process of covering a surface as with a plate, by dipping, electrodeposition, etc., or the coating so applied.

Plate.—To coat with a thin layer of metal, as silver or gold, by electrodeposition, hammering, or otherwise.

Oxford Dictionary:

Plated.—Covered or overlaid with a thin film of gold or silver.

Plating.—The process of coating with a thin adherent layer of precious metal.

Knight's Mechanical Dictionary:

Plating.—The art of covering baser metals with a thin coat of silver or gold was practiced by the Orientals and Egyptians many centuries before Europeans excelled in ornamental metallurgy.

The process is now extensively applied to the cheaper metals, those which are more oxidizable being protected by those which are less so.

See also Electro-plating; Nickel-plating; Gilding; Silvering; Platinizing; Tin-plate, etc.

Cooley's Cyclopædia of Practical Receipts, Processes, and Collateral Information in the Arts, Manufactures, Professions, and Trades (1864):

Plating.—The art of covering copper and other metals with either silver or gold.

Plating is performed in various ways. Sometimes the silver is fluxed onto the surface of the copper by means of a solution of borax, and subsequent exposure to the "plating furnace." and the compound ingot is then rolled to the requisite thinness between cylinders of polished steel. The common thickness of the silver plate before rolling is equal to about the one-fortieth of that of the compound ingot. Sometimes the nobler metal is precipitated from its solutions upon the copper by the action of chemical affinity, or, more frequently, by the agency of electrochemical decomposition (electro-plating).

Beeton's Dictionary of Industries and Commerce (1888):

Plating.—The art of covering copper and other metals with silver or gold, either for use or ornament. It is effected in various ways. Sometimes the silver is attached to and rolled out with the copper, and sometimes one metal is precipitated from its solution upon the other. Of late years manufacturers have availed themselves of electrochemical decomposition for the purpose of plating different metals. (See Electroplating.)

The English and American Mechanic, An Every Day Book for the Workshop and Factory (1890):

To make and apply silver-plating solution.—Put together in a glass vessel one ounce nitrate of silver, two ounces cyanuret potassa, four ounces prepared Spanish whiting, and ten ounces pure rain water. Cleanse the article to be plated as per preceding directions and apply with a soft brush. Finish with the chamois skin or burnisher.

The Scientific American Cyclopedia of Formulas (Hopkins) (1911):

Electrometallurgy and metal coating, * * *.—Silver plating. * * *.

Simple instructions for.—1. For silver plating the bath consists of a potassium silver cyanide, prepared by precipitating solution of silver nitrate with potassium cyanide and redissolving the washed precipitate in excess of potassium cyanide solution; potassium cyanide, 12 ounces; water, 1 gallon; silver cyanide, about 1 troy ounce * * *.

Henley's Twentieth Century Book of Recipes, Formulas, and Processes (1912):

Plating.—The plating of metal surfaces is accomplished in four different ways: (1) By oxidation, usually involving dipping in an acid bath; (2) by electro deposition, involving suspension in a metallic solution through which an electric current is passed; (3) by applying a paste that is fixed, as by burning in; (4) by pouring on molten plating metal and rolling.

According to the foregoing authorities, which give expression to the common knowledge, the terms "plated with gold or silver" when used without limitation signify that the given articles are coated with gold or silver by any one of the several known processes which are employed to cover or coat such articles with a layer of gold or silver. The terms therefore signify the final condition of the articles in question rather than the process which has produced that condition. *Bloomington Bros. v. United States* (3 Ct. Cust. Appls., 204; T. D. 32530).

The importers contend that the terms in question as used in paragraph 167, *supra*, should be construed with reference to the same terms as used in paragraph 356 of the act, being the jewelry paragraph. In the latter paragraph Congress uses the terms "washed, covered, or plated," with reference to articles of jewelry, following in this particular the jewelry provisions of preceding tariff acts. It is argued that Congress thereby differentiated between the condition of metals which were plated and that of metals which were washed or covered with another metal, the former being a substantial and durable condition, the latter being the slighter covering produced by washing or some similar process. The importers contend that this use of the term "plated" in the jewelry paragraph implies a similar use of the same term in the somewhat related metal paragraph.

It seems, however, more reasonable to conclude that in paragraph 356 Congress used the words "washed" and "covered," in conjunction with the word "plated," out of abundance of caution, and not

with the intention of fixing a limited meaning upon that last term, such as should obtain throughout the entire act. The words "washed" and "covered" of themselves suggest this conclusion, because those terms can hardly apply to classes which are exclusive of one another.

In this view of the case the decision of the board is *affirmed*.

LARZELERE & Co. v. UNITED STATES (No. 1412).¹

1. APPEALS.

Appeals are regulated or denied by statute and the determination of the tribunal of a question of law or fact is final unless an appeal be authorized either by the organic law or some effective statute.

2. APPEAL TO REAPPRAISEMENT BY COLLECTOR.

The review of legislation affecting a collector's right to "appeal" to reappraisement reveals no statutory method governing him in making his appeal; but viewing this legislation as a whole it is *held* that it is an appeal if he complies with the regulation authorizing him, if he is dissatisfied with the appraisement, he may and shall transmit the invoice and all the papers appertaining thereto to the board of nine general appraisers. The transmission by a collector of another port by mailing is a compliance with the statute.

United States Court of Customs Appeals, February 12, 1915.

APPEAL from Board of United States General Appraisers, Abstract 35421 (T. D. 34416).

[Affirmed.]

Albert H. Washburn and *J. Stuart Tompkins* for appellant.

Bert Hanson, Assistant Attorney General, for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

The question presented in this case is, What action must be taken by the collector to perfect an appeal to reappraisement from the decision of a single general appraiser? As will be seen, the statute is obscure and difficult of interpretation.

A history of the statute from its origin in the act of June 10, 1890, may aid in a solution of the question. By section 13 of the act of 1890 it is provided:

If the collector shall deem the appraisement of any imported merchandise too low he may order a reappraisement, which shall be made by one of the general appraisers, or, if the importer, owner, agent, or consignee of such merchandise shall be dissatisfied with the appraisement thereof, and shall have complied with the requirements of law with respect to the entry and appraisement of merchandise, he may, within two days thereafter give notice to the collector, in writing, of such dissatisfaction, on the receipt of which the collector shall at once direct a reappraisement of such merchandise by

¹ Reported in T. D. 35154 (28 Treas. Dec., 247).

one of the general appraisers. The decision * * * of the general appraiser in cases of reappraisement shall be final and conclusive as to the dutiable value of such merchandise against all parties interested therein, unless the importer, owner, consignee, or agent of the merchandise shall be dissatisfied with such decision, and shall, within two days thereafter give notice to the collector in writing of such dissatisfaction, or unless the collector shall deem the appraisement of the merchandise too low, in either case the collector shall transmit the invoice and all the papers appertaining thereto to the board of three general appraisers, which shall be on duty at the port of New York, * * *.

It will be noted that neither the notice required to be given by the importer nor the action to be taken by the collector is referred to in this statute as an appeal, but the Customs Regulations of 1908 (art. 894), provides that—

If the importer, owner, consignee, or agent of the merchandise be dissatisfied with the appraisement, he may appeal for reappraisement if he has complied with the legal requirements in respect to entry and appraisement. This appeal may be brought by filing a notice of dissatisfaction in writing with the collector, on form catalogue No. 601, which notice must always be given before the end of the second official day on which the collector gave the notice prescribed in article 884. If the collector deem the appraisement too low, he also may appeal, which shall be done by ordering a reappraisement by a general appraiser.

Article 895 provides:

Appeals may be taken from reappraisements, either by the collector or by the importer, owner, consignee, or agent, in the same manner as prescribed for appeals from appraisements by local appraisers.

Article 896 provides:

On receipt of an importer's notice to the collector claiming reappraisement, or on an appeal made officially by himself, the collector shall promptly transmit all invoices and other papers pertaining to the reappraisement to the Board of United States General Appraisers at New York.

It will be noted that these regulations refer to the act of the collector in ordering a reappraisement as an appeal, and the action of the collector in securing a review by the board of three general appraisers is referred to as an appeal. All that was required by the collector to perfect this "appeal" to reappraisement was that he should deem the appraisement of merchandise too low, unless the additional requirement that he should transmit the invoice or invoices and all papers pertaining thereto to the board of three general appraisers should be a part of the act of appeal.

It was after the Treasury interpretation of these statutory provisions that the act of 1909 was enacted, and that statute should be construed with reference to this practice. This statute of 1909, subsection 13, section 28, provided:

If the collector shall deem the appraisement of any imported merchandise too low, he may, within sixty days thereafter, appeal to reappraisement, which shall be

made by one of the general appraisers, or if the importer, owner, agent, or consignee of such merchandise shall be dissatisfied with the appraisement thereof, and shall have complied with the requirements of law with respect to the entry and appraisement of merchandise, he may within ten days thereafter give notice to the collector, in writing, of such dissatisfaction. The decision of the general appraiser in cases of reappraisement shall be final and conclusive as to the dutiable value of such merchandise against all parties interested therein, unless the importer, owner, consignee, or agent of the merchandise shall be dissatisfied with such decision, and shall, within five days thereafter, give notice to the collector, in writing, of such dissatisfaction, or unless the collector shall deem the reappraisement of the merchandise too low. and shall within ten days thereafter appeal to re-appraisement; in either case the collector shall transmit the invoice and all the papers appertaining thereto to the board of nine general appraisers, * * *.

Several points worthy of consideration in this connection will be noted: First, the action taken by the collector looking to re-appraisement is here first spoken of in the *statute* as an appeal; and, secondly, it is here for the first time restricted as to time. Another thing is to be noted, and that is, that no machinery or method of appeal is pointed out, and nothing appears to indicate what action should be taken by the collector in perfecting his appeal, unless it be the transmission of the papers appertaining to the case. It would seem, therefore, to be a reasonable view that what the Congress intended by this act is that the affirmative action by the collector should be what was required under the act of 1890, namely, the transmission of the invoice and all the papers appertaining thereto to the Board of General Appraisers, and that the limitation as to time for the appeal would apply to *this* act of the collector.

Under this interpretation, if the collector shall, within 10 days from the time of appraisement by the single general appraiser, transmit the invoice and all the papers appertaining thereto to the board of nine general appraisers for a re-appraisement, he has done all that the statute in terms requires. If this be not the act required, the statute is, to say the least, vague and uncertain.

Appeals are regulated or denied by statute. (2 Cyc., 537.) The determination by a tribunal of a question of law or fact is final unless an appeal be authorized either by the organic law or some effective statute. *Waterman v. Bailey* (111 Mich., 571). But to be effective the method of taking the appeal must be pointed out. Statutes are of two kinds, some prescribing that an appeal be taken by application to a reviewing body, as a court of appeals, and others requiring simply the filing of a claim of appeal with the determining tribunal. Neither the one method nor the other is pointed out in this statute, and this leads to the conclusion that the statute should be read as a whole, and if anywhere within its limits can be found any requirement indicating what act on the part of the collector is required to constitute the appeal, that method should be held to be the one intended. Now,

there is a requirement in this statute that the collector shall, in case he deems the appraisalment of merchandise too low, transmit the invoice and all the papers appertaining thereto to the board of nine general appraisers. It is more than a mere coincidence that this act of transmitting the papers to the Board of General Appraisers in a case of appeal from a reappraisalment is precisely what was required of the collector under the act of 1890, and that it is this act which was referred to in the Customs Regulations as an appeal from reappraisalment to be taken by the collector.

The requirement being that the collector shall transmit the invoice and papers to the Board of General Appraisers as the act of appeal, it would seem that if he performed all that is required of him within the 10 days he has perfected an appeal, even though the papers be not received in the regular course within the 10 days.

In the present case it appears that the papers were signed by the collector of the port of Philadelphia on the 8th day of October, 1912, and were transmitted to and received by the Board of General Appraisers on October 9, 1912. It is suggested that the evidence is silent as to when the papers were mailed, but we think that the date of signing, aided by the presumption of regularity of official proceedings, would be sufficient to indicate that the papers were mailed on the day of their execution.

The Board of General Appraisers has in one or two cases taken the view, under the statute of 1909, that the appeal of the collector is not perfected until the papers are actually received by the appraisers. This result appears to have been reached by finding an analogy between an appeal by the importer and that authorized to be taken by the collector. But the statutory provisions are quite unlike. The appeal of the importer can be perfected only by giving notice to the collector, and in the absence of anything in the statute indicating that service by merely mailing within that date would be sufficient, the requirement would seem to be clear enough that the notice must be in the hands of the collector within the 10 days. But such is not the language of the statute as it relates to the collector. As to his appeal, as before stated, there is no method pointed out for making an appeal except the transmission of these papers, and the transmission by a collector of another port than New York by mailing is, we think, a compliance with this statute. See Customs Regulations, 1908 (art. 1595 *et seq.*).

The Board of General Appraisers in the present case, while filing no opinion, held that such service was sufficient, and we think the decision should be *affirmed*.

GUTTERMAN, ROSENFELD & Co. v. UNITED STATES (No. 1452).¹

ALUMINUM DISKS.

Reviewing the processes by which aluminum is prepared for market and also the legislation affecting aluminum itself, these disks are found not to be included in any of the terms "plates," "sheets," "bars," "strips," or "rods," as these are employed in paragraph 143, tariff act of 1913; nor is it aluminum in crude form or an alloy thereof under the same paragraph.—*Universal Shipping Co. v. United States* (4 Ct. Cust. Appls., 245; T. D. 33479).

United States Court of Customs Appeals, February 12, 1915.

APPEAL from Board of United States General Appraisers, Abstract 36158 (T. D. 34668).

[Affirmed.]

F. E. Hamilton for appellants.

Bert Hanson, Assistant Attorney General (*Thomas J. Doherty*, special attorney, on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

DE VRIES, Judge, delivered the opinion of the court:

The merchandise consists of aluminum disks. They were rated for duty by the collector of customs at the port of New York as "articles or wares not specially provided for" under the provisions of paragraph 167 of the tariff act of 1913. The protestant, who is the appellant here, makes claim that they are properly dutiable under the provisions of paragraph 143 in said act as "aluminum in plates or sheets."

Aluminum as the subject of tariff legislation first received specific mention in the tariff act of 1890. Something of the development of the aluminum industry as well as the purpose of Congress to divide for tariff purposes the crude from the manufactured product is marked by the respective provisions of that and subsequent tariff acts. They are as follows:

The tariff act of 1890, paragraph 186, reads:

186. Aluminium or aluminum, in crude form, alloys of any kind in which aluminum is the component material of chief value, fifteen cents per pound.

The tariff act of 1894, paragraph 157, reads:

157. Aluminum, in crude form, alloys of any kind in which aluminum is the component material of chief value, ten cents per pound.

The tariff act of 1897, paragraph 172, reads:

172. Aluminum, and alloys of any kind in which aluminum is the component material of chief value, in crude form, eight cents per pound; in plates, sheets, bars, and rods, thirteen cents per pound.

The tariff act of 1909, paragraph 172, reads:

172. Aluminum, aluminum scrap, and alloys of any kind in which aluminum is the component material of chief value, in crude form, seven cents per pound; in plates, sheets, bars, and rods, eleven cents per pound; * * *.

¹ Reported in T. D. 35155 (28 Treas. Dec., 251).

The tariff act of 1913, paragraph 143, reads:

143. Aluminum, aluminum scrap, and alloys of any kind in which aluminum is the component material of chief value, in crude form, 2 cents per pound; aluminum in plates, sheets, bars, strips, and rods, 3½ cents per pound; * * *.

Thus it is shown that until 1897 no division or separate duty was had distinguishing the crude aluminum and alloys from manufactures thereof. In 1897, by the tariff act of that year, Congress distinguished and prescribed different rates of duty upon aluminum and alloys thereof, evidently the crude material, from certain enumerated manufactures thereof, to wit, plates, sheets, bars, and rods. By the tariff act of 1913 Congress added an additional enumeration, "strips."

This record defines the method of aluminum manufacture. It seems to make its first commercial appearance in the block forms, which vary in size, the variances being intentional according to the size of a sheet, plate, bar, rod, or other form of aluminum which is to be produced from the block. To produce the latter the block is heated and passed through rolls, which is called a breaking-down process. This process is continued until the product is of the desired thickness. The resultant rough edges are cut, trimmed off, or flattened out, whereby is produced what is known as "sheets" and "strips." From these sheets and strips in turn are produced among other things these importations. It appears from the record that their size is controlled by the specific order, as they are made in any size only according to order, which could be for no other purpose or reason than to fit a certain requirement in use, thereby becoming as imported part of a completed article. This is true also of squares and oblongs, and possibly other specifically ordered shapes, forms, or sizes of aluminum. Whatever confusion of the respective names may occur in the record, it satisfactorily appears that the above-stated steps of manufacture and customs of trade in ordering are uniformly exercised in order to produce aluminum circles or disks. It likewise appears that it is more expensive to produce a circle than it is a square or oblong. This is obvious, and shown by the answer of the witness to the direct question, wherein he states:

It is pretty hard for me to answer, not having a knowledge of that part of the manufacture. Of course, I can only say that my firm buys circles really at the same price we do strips when you consider the loss there is from scrap.

This court, in *Universal Shipping Co. et al. v. United States* (4 Ct. Cust. Appls., 245; T. D. 33479), had merchandise of the identical form and material before it for consideration. That merchandise consisted of so-called aluminum "blanks," stated by the court to be in two forms, one square and the other cut in the form of a circle. The court held that they were not plates or sheets within the pro-

visions of paragraph 172 of the tariff act of 1909, and were properly dutiable as articles composed of aluminum, partly or wholly manufactured, under paragraph 199 of that act. This decision was before the Congress, having been made May 23, 1913, at the time of the enactment of the tariff act of that year, and must be deemed to have been considered by Congress. The only change made in the act of 1913 was to add the word "strips" to the enumerated classes of aluminum given the specific rate of duty. Had it been the purpose of Congress to include circles such as these, we must assume that apt words for that purpose would have been used. On the other hand, strips being in the same status of manufacture as sheets from which circles are made, cogent reason is shown why circles were not so included by Congress but left as classified at a higher duty.

We are of the opinion that these importations are not for the reasons stated included in any of the terms plates, sheets, bars, strips, or rods, as used in paragraph 143 of the tariff act of 1913, nor is it aluminum in crude form nor an alloy thereof under the same paragraph. On the contrary, the history of this provision of the law, as disclosed by its predecessor paragraphs and the testimony in this case, confirms the court in the belief that it is a more advanced article of manufacture than was intended by Congress to be included within the claimed provision of the act.

The protestant in this case makes claim under subsection 7, paragraph J, section 4, of the tariff act of October 3, 1913. This point, however, was not decided by the Board of General Appraisers and was not argued nor submitted for decision in, and therefore not decided by, this court. It is deemed to have been waived.

Affirmed.

UNITED STATES *v.* AMENDOLA (No. 1461).¹

This merchandise consists of Italian pine cones with the nuts attached thereto. The nuts are held to be dutiable under the *eo nomine* provision for nuts in paragraph 283, tariff act of 1909. The cones are not shell nor "dirt or other impurities" in the nuts, and duty should be assessed upon the weight of the nuts alone.

United States Court of Customs Appeals, February 12, 1915.

APPEAL from Board of United States General Appraisers, Abstract 36255 (T. D. 34698).

[Affirmed.]

Bert Hanson, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, of counsel), for the United States.

Curie, Smith & Maxwell for appellee.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MARTIN, Judge, delivered the opinion of the court:

The importations consist of pine cones with their nutlike seeds still attached to them.

¹ Reported in T. D. 35156 (28 Treas. Dec., 253).

The collector assessed duty upon the merchandise at the rate of 1 cent per pound as nuts not specially provided for under paragraph 283 of the tariff act of 1909. Duty was assessed at that rate upon the aggregate weight of the cones and nuts, in accordance with the departmental instructions contained in T. D. 31854.

The importers protested against the assessment, claiming that the merchandise was free of duty as a crude vegetable substance under paragraph 630 of the act, and claiming furthermore that if the article was dutiable as nuts the duty should be assessed only upon the weight of the nuts themselves and not upon the weight of both cones and nuts.

The protest was submitted upon evidence to the Board of General Appraisers and was in part sustained. The board held that the merchandise was dutiable at 1 cent per pound as nuts under paragraph 283, *supra*, but that the duty should be assessed only upon the weight of the nuts and not upon that of the attached cones also. Upon the evidence before it the board held that the weight of the nuts was 20 per cent of the gross weight of the merchandise, and the collector was authorized to reliquidate upon that basis. The Government now appeals from that decision.

The following is a copy of paragraphs 283 and 630 of the tariff act of 1909:

283. Nuts of all kinds, shelled or unshelled, not specially provided for in this section, 1 cent per pound; but no allowance shall be made for dirt or other impurities in nuts of any kind, shelled or unshelled.

(Free list.) 630. Moss, seaweeds, and vegetable substances, crude or unmanufactured, not otherwise specially provided for in this section.

It appears from the testimony that the cones in question are imported from Italy in the condition in which they are when first taken from the tree, with the nuts attached under the imbricated leaves or scales of the cone. The cones with the nuts attached are bought and sold in the markets by the hundred. The cones are shattered into pieces as the best means of recovering the nuts, the broken pieces are burned up or thrown away as valueless, and the nuts are eaten "like peanuts." As stated above, it appears from the testimony that in the case of the present importation the nuts themselves constituted 20 per cent of the gross weight of the importation.

It seems clear from the foregoing statement that the joint importation of nuts and cones would not be entitled to free entry as crude vegetable substances, although the cones would be free if imported alone. Nor would the importation be one of seeds, for while the attached nuts are indeed the seeds of the pine tree, they are not imported or used in this country as seeds but as fruits or articles of human food.

The following definitions, expressive of the common use of the given words, will aid in the present inquiry:

Standard Dictionary:

Nut.—A fruit consisting of a kernel or seed inclosed in a hard, woody or leathery shell that does not open when ripe, as in the hazel, beech, oak, chestnut, etc.

Shell.—A hard outer cover of a fruit, as a walnut shell.

It may be seen from the foregoing definitions that while the pine nuts now in question are seeds botanically speaking, they are nevertheless more specifically known as nuts according to the common usage of these terms. They therefore fall within the *eo nomine* classification of paragraph 283, *supra*. Mayer & Co.'s case (T. D. 20038), Van Dyk & Co.'s case, Abstract 25595 (T. D. 31616); Garguilo's case, Abstract 26085 (T. D. 31757); department instructions (T. D. 31854).

The question next arises whether the appropriate duty should be assessed upon the gross weight of the cones and nuts taken together or only upon the weight of the nuts alone.

Paragraph 283, *supra*, imposes a duty by the pound upon nuts shelled or unshelled, and provides that no allowance shall be made for dirt or other impurities in nuts of any kind. The first question, therefore, is whether the cones should be weighed for duty upon the theory that they are the shells of the pine nuts. If this question be answered in the negative the question next arises whether the cones should be regarded as "dirt or other impurities in" the nuts, for which the paragraph prohibits any allowance.

It seems clear from common knowledge that these two questions should both be answered in the negative.

As appears from the foregoing definitions the shell of a nut is "a hard, outer cover of a fruit," being "a hard, leathery" cover which "does not open when ripe." Judged by these definitions the cones in question are not shells, nor are they parts of the nuts as such, since they do not serve in any way to inclose or cover the nut kernels. The pine nuts themselves, however, are inclosed or covered by shells like those of almonds or walnuts, except that they are not so thick and substantial. These shells grow upon the cones and contain the kernels as do the shells of other familiarly known nuts. It seems clear, therefore, that the cones are not shells and are not dutiable as such.

It is equally improper to describe the cones as "dirt or other impurities in" the nuts. They are obviously not "dirt," nor do they respond to the description of "other impurities in" the nuts. In the case of the present importations the cones weigh four times as much as the nuts, and are more bulky than the nuts in even a greater proportion. They can hardly be described as "impurities in" the nuts which they thus hold and carry. It is true that the cones and nuts

are imported as entireties; nevertheless it is administratively practicable to ascertain the net weight of the nuts alone. At least there is nothing in the present record which contradicts the testimony of the importer to that effect. There seems, therefore, to be no reason why they should not be separated for duty purposes, and the nuts assessed alone, they being in fact the only dutiable portion of the importation.

In accordance with the foregoing views the decision of the board is *affirmed*.

UNITED STATES *v.* LAURENTIDE PAPER CO. (No. 1368).¹

CANADIAN WOOD PULP AND NEWS PRINT PAPER.

The question is whether there was by a Canadian rule or regulation any prohibition or restriction of exportation either by contractual relation or otherwise, directly or indirectly, applicable to this merchandise; whether the act of July 26, 1911, controls. Section 13 of the Canadian woods and forest regulations did contain such a prohibition, and, so far as the record discloses, it remained in force until December 31, 1912, when, by an order in council, the prohibition was not to be enforced and provision was made that the prohibition was to be deemed inoperative from May 1, 1911. The merchandise here, as the record shows, was cut from the lands described in that order and was manufactured, in part at least, prior to December 31, 1912. Our statute has its own field of operation, and this operation is not to be defeated by another authority. Under our statute and under the facts shown here this wood pulp and news print paper were not entitled to free entry.

United States Court of Customs Appeals, February 12, 1915

APPEAL from Board of United States General Appraisers, Abstract 34940 (T. D. 34219).

[Reversed.]

Bert Hanson, Assistant Attorney General, for the United States.

Allan R. Brown for appellee.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

The merchandise the subject of importation in this case consists of certain wood pulp and news print paper exported from the Province of Quebec, Canada, into the United States. It was assessed at the ports of entry under paragraph 409 of the tariff act of 1909 at three-sixteenths of 1 cent per pound, and for the reason that the Province of Quebec had prohibited the free exportation of wood from which the wood pulp and news print paper were manufactured an additional one-tenth of 1 cent per pound.

¹ Reported in T. D. 35157 (28 Trans. Dec., 256).

The evidence shows that the wood pulp and news print paper imported were made from wood grown and cut on Crown lands in the Province of Quebec; that section 13 of the Canadian woods and forest regulations of April 26, 1910, contained a prohibition and restriction against the exportation of such wood. The evidence further shows that in the winter of 1911 and 1912 the wood from which the product imported was manufactured was cut from these Crown lands; that it was run down streams in the summer and manufactured into wood pulp and into news print paper during the winter of 1912 and 1913. The precise time at which it was manufactured is not shown as to all the material, although the testimony of the importers' witness is to the effect that the wood was ground up into paper (pulp?) probably all since the 1st of December, 1912.

The importers duly protested against the assessment as made by the collector, and their protest having been sustained the case is brought here for review.

There are numerous assignments of error, some relating to the exclusion of testimony offered on cross-examination and others going directly to the merits of the case, error being assigned on the order of the board sustaining the protests and specifically in holding that the merchandise was manufactured from wood on which there was no prohibition or restriction of exportation either by contractual relation or otherwise, directly or indirectly. The latter assignment of error presents the meritorious issue in the case.

As before stated, under section 13 of the Canadian woods and forest regulations, prohibition against the exportation of wood cut on Crown lands was in force. This prohibition remained in force, so far as this record discloses, up to the 31st of December, 1912. At that date an order was entered by the lieutenant governor in council which provided that article 13 of the woods and forest regulations "shall not apply to timber cut from the 1st day of May, 1911, and which will be cut thereafter on the timber limits hereinafter described; and that all pulp wood cut from the 1st day of May, 1911, or which will be cut hereafter on the said timber limits, or the paper, paper board, or wood pulp manufactured from the wood cut on such timber limits, may be exported free of any export duty, or any other charge of any kind whatsoever, or any prohibition or restriction in any wise relating to such exportation." The timber limits described covered those from which the timber, from which the importations in question were manufactured, was cut.

There was evidence showing that the power to enter an order suspending the provisions of article 13 of the woods and forest regulations was vested in the lieutenant governor in council, and it was testified by an expert witness, an attorney of Canada, that he had power to make his order retroactive.

Accepting this testimony as establishing the facts claimed and assuming the entire good faith of the transaction, the question is still left as to whether the importers have made a case which overcomes the presumption of correctness which attaches to the assessment of the collector. The claim of the importers is that under the terms of section 2 of the act of July 26, 1911, the importation in question is entitled to free entry.

This section provides for the free entry of pulp wood, pulp, and news print paper of the quality here in question "on the condition precedent that no export duty, export license fee, or other export charge of any kind whatsoever (whether in the form of additional charge or license fee or otherwise), or any prohibition or restriction in any way of the exportation (whether by law, order, regulation, contractual relation, or otherwise, directly or indirectly), *shall have been imposed* upon such paper, board, or wood pulp, or the wood used in the manufacture of such paper, board, or wood pulp, or the wood pulp used in the manufacture of such paper or board."

This section was construed by this court in *Cliff Paper Co. v. United States* (4 Ct. Cust. Appls., 186; T. D. 33435), and it was there said:

It is thus provided by the condition precedent that free entry into this country shall be had by Canadian paper or wood pulp only when the given paper and wood pulp, and the wood from which they were manufactured, are entitled to exportation from Canada free of any export charge or prohibition or restriction of exportation.

This case established the rule that the question in each case is whether the particular importation is itself subject to no prohibition or restriction of exportation and that the wood from which it is manufactured is alike free. It would seem that a fair reading of the condition itself would establish that freedom from restriction upon the right to export wood must be continuous from the time it is cut from the stump and becomes wood up to and including the time of its manufacture into an advanced product. If this were not so, the reasonable and logical time and opportunity for marketing the product as wood may have passed by and the restriction may have worked out a result in direct opposition to the purpose of the act.

The purpose of this restriction or limitation on the free importation of wood and paper provided for in this section is too clear to require extended comment. It obviously was an attempt to make possible the importation from Canada of pulp wood in the raw state for the use of our own manufacturers. It would not at all answer this purpose to say that at the time of exportation of the product in its manufactured state as wood pulp or news print paper the wood from which they had been manufactured would have been admitted free had it up to that time remained in its condition as wood, and it would certainly impair very materially the advantages to be derived from such

freedom from restriction if at any time after it was cut from the stump it was subject, for any period whatever, to restrictions or prohibitions of exportation.

But the question here presented is still more narrow. It is whether it is sufficient to answer this requirement that there shall be no prohibition or restriction of exportation of wood or export duty chargeable against such wood from which the wood pulp has been manufactured existing at the very time of the exportation of such advanced product, or whether the freedom or restraint of exportation must have existed at least at the time when the wood was manufactured into wood pulp. Upon this question there would seem to be no room for doubt. Assuming the power of the lieutenant governor in council to make an order relating to timber limits retroactive as it affects the rights of the licensee as between itself and the Dominion of Canada and its Provinces, it is clear that he has no power to defeat by such an order the purpose and letter of the condition to free entry which our own statute imposes. The time has elapsed when a right to free exportation can for an instant be vested in the owner of this pulp wood. It is apparent from this record that as early as the 1st of December, 1912, the manufacture of this particular wood was entered upon. To what extent it was manufactured before the 31st of December the record fails to show, and as the burden of proof is upon the importers, who attack the assessment, and as we have no means of distinguishing between pulp and print paper thereafter manufactured from that which was manufactured during the month of December, we must treat each alike, and it follows that at the time of the manufacture of a portion at least of this product there was in fact an absolute prohibition against the exportation from Canada of wood in the form in which it was cut from the land. The fact that subsequently the empty right to export wood, which is no longer in existence, but which has become something else, is given does not meet the condition in our law. This consideration is alone sufficient to show the error in the result reached.

It is due to the Board of General Appraisers to state that this point appears not to have been pressed to their attention. The decision of the board must, however, be *reversed*.

SMITH & Co. v. UNITED STATES (No. 1380). LA MONTAGNE'S SONS
v. UNITED STATES (No. 1381).¹

CATALOGUES—ADVERTISING MATTER GRATUITOUSLY CIRCULATED.

These importations were trade publications used for advertising purposes and they were distributed gratuitously and generally to the public. They did not come within the provision for free entry contained in paragraph 517, tariff act of 1909.

United States Court of Customs Appeals, February 23, 1915.

APPEAL from Board of United States General Appraisers, Abstract 34903 (T. D. 34219),
Abstract 34931 (T. D. 34219).

[Affirmed.]

B. A. Levett for appellants.

Bert Hanson, Assistant Attorney General (*Thomas J. Doherty*, special attorney, on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

These two cases were heard together, the question in each being whether certain diaries and Christmas books are entitled to free entry under paragraph 517 of the act of 1909.

In the Smith case, the importers' witness testified in answer to the question—

Q. For what purpose are the books and pamphlets sent to you?—A. To be used as advertising matter; as an advertising medium.

Q. What do you do with them when you get them here?—A. Distribute them to the various grocers throughout the country.

Q. To what class of people?—A. I distribute these diaries to various buyers or members of firms who do business with us; Christmas books I give to the retail grocers in the trade to distribute to the children.

Q. Are any charges made for the publication?—A. No charge.

Q. You send them out yourself from your place?—A. We do.

He testified also that they imported about 2,500 diaries and 11,000 Christmas books, and on cross-examination stated:

Q. You give each of these to anybody that wants one, I suppose?—A. Well, we give the diaries to any respectable person that asks for them.

Q. They are intended for the public, aren't they?—A. They are.

Q. As a part of your advertising plan?—A. Yes, sir.

In *La Montagne's Sons'* case, the witness for the importers testified that his firm imported a large number of diaries issued by Gordon & Co., of London, containing an advertisement of gin, and that when these books are imported they are distributed. In answer to the question—

To what class of people?

He replied—

Generally to the private people; to the trade; they are privately distributed among private people.

Q. Any charge made for them?—A. None whatever.

¹ Reported in T. D. 35173 (28 Treas. Dec., 209).

On cross-examination he was asked if they were used for advertising matter and answered that they were. In answer to the question, "They are intended to be distributed to the public generally, are they?" he answered that they were.

The board overruled the importers' protest in each case on the ground that the importations were mere trade publications used for advertising purposes and not within the provisions for free entry contained in paragraph 517.

In this opinion we concur. This advertising matter was clearly not introduced for private circulation. Nothing could be more public than to furnish advertising matter to anyone who would accept it, and the evident purpose was to get the books into the hands of as many of the public as would be likely to be interested in the advertising matter. It is difficult to conceive any gratuitous publication which could be more generally public.

The case is clearly distinguishable from the cases cited in the brief for the importers, as in all these cases the publications were of a very different character from this. They were something more than mere advertising matter. They were books containing general information and were restricted in their issue to a particular class of people.

The decision of the board is *affirmed*.

PETRY CO. v. UNITED STATES (No. 1383).¹

Unbound photomechanic reproductions of paintings, having descriptive titles appearing severally in the German, French, and English languages, accompanied by an index, but intended to be completed before being bound or published by the addition of a preface in English, which would constitute English the predominant language, held not so far a completed entity as to warrant their introduction as books published chiefly in a foreign language.—The case of *Macmillan Co. v. United States* (116 Fed. 1018), distinguished.

These productions are held dutiable as assessed under paragraph 416 of the act of 1909.

United States Court of Customs Appeals, February 23, 1915.

APPEAL from Board of United States General Appraisers, Abstract 34932 (T. D. 34219).

[Affirmed.]

Curie, Smith & Maxwell (Thomas M. Lane of counsel) for appellants.

Bert Hanson, Assistant Attorney General (*Harry M. Farrell*, special attorney, on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

The importation in question consists of unbound photomechanic reproductions of famous paintings. A separate volume is devoted

¹ Reported in T. D. 35174 (28 Treas. Dec., 301).

to each artist, the series reproducing the works of such masters as Correggio, Donatello, Murillo, Rembrandt, Michelangelo, and others (22 in all). The printed matter consists of English, German, and French. Under each picture occurs in the English, French, and German languages a statement as to where the original is hung and a brief history of the picture, as "Fray Lauterio before the Madonna, St. Francis and St. Dominic." Upon the first flyleaf of the volume submitted as a sample is a list of the series, the descriptive matter being in German and the names being mostly foreign. Upon the second flyleaf occurs the word "Murillo" on the one side, and on the reverse side the following:

Klassiker der Kunst
in Gesamtausgaben
Zweiundzwanzigster Band
MURILLO
Stuttgart und Berlin
Deutsche Verlags-Anstalt
1913

A translation of which is as follows:

Classics of art, in collection. Twenty-second volume. Murillo. Stuttgart and Berlin. German Printing Establishment. 1913.

On the reverse side of the third flyleaf is a reproduction of a self-portrait of Murillo, with the usual descriptive matter underneath in three languages.

On the fourth flyleaf is the following:

Der Verkauf dieses Werkes nach Frankreich ist untersagt. Eine französische Ausgabe erscheint im Verlage von Hachette & Cie., Paris.

Druck der Deutschen Verlags-Anstalt in Stuttgart. Papier von der Ersten Deutschen Kunstdruck-Papierfabrik Carl Scheufelen in Oberlenningen-Teck (Württemberg).

A translation of which is as follows:

The sale of this work to France is prohibited. A French edition is published by the publishing house of Hachette & Co., Paris.

Publication of the German Printing Establishment in Stuttgart. Paper from the First German Art Press Paper Factory of Oberlenningen-Teck (Württemberg).

The publications were claimed to be free of duty under paragraph 518 of the tariff act of 1909, which exempts books and pamphlets printed chiefly in languages other than English. They were assessed for duty under paragraph 416 providing for books of all kinds, bound or unbound, engravings, photographs, etc. The Board of General Appraisers affirmed the assessments, and the importer brings the case here for review.

The question is whether these sheets as imported constitute a book printed chiefly in languages other than English. In so far as the

pictures can be regarded as printing, it can not be said that they are printed in a foreign language. The appeal to the student of the old masters is in a language which is universal. The underwritten title of the picture, which is given in German, French, and English, simply identifies the picture, and in some instances the material or object on which the picture is painted is stated in German, and dates are given showing the probable time when the painting was executed. The printed matter appearing on the flyleaf tells no connected story. It is in the nature of an advertisement or descriptive title of the series.

The testimony shows that the book as imported is not the complete book as it is expected to be furnished to the trade. Before it is marketed it appears by the importers' testimony that there is to be added a preface. The extent of this preface is not stated. Presumably it is in the English language and evidently is regarded as of commercial importance, deemed necessary to make the book complete or marketable.

While the fact that the book is unbound does not remove it from this paragraph, its character as a book must be fixed before importation to bring it within its terms, and when we find that the book which is actually marketed in this country contains matter printed in English in connection with that in the foreign language we think the importer can not successfully maintain that the portion which he imported should be treated as a separate entity and as a complete book, when in fact it is not the complete book of actual use.

Had the book been complete when offered for importation in the form published in this country it would, as is fairly inferable, not have fallen within this paragraph, which speaks of books and pamphlets and not of parts of the same. True, the witness testifies that the preface is not an absolutely essential part of the work, as the imported sheets could be bound up without it. It may be said that the individual sheets might have a use as separate reproductions of paintings, but in neither case would the sheets in the aggregate or the individual sheets constitute the book intended for actual use. The question is whether something which might be bound up in the form of a book, but which is not designed for such use and which when completed for publication is taken out of the descriptive terms of the statute, may be treated as the book provided for in this paragraph, when it appears, as is fairly inferable, that had the book in its completed form been offered it would not be admitted, thus according to a part a character which the whole would not bear and opening the door to evasions.

This feature distinguishes this case from that of *Macmillan Co. v. United States* (116 Fed., 1018), as in that case had all the matter that finally appeared in the book been with it when offered for entry it would only have confirmed its character as a scientific book, while

in this case the matter to be added in this country fixes the character of the book as one not entitled to free introduction under paragraph 518. Had there been a provision for parts of books a different question would be presented. See *Kraemer & Co. v. United States* (5 Ct. Cust. Appls., 66; T. D. 34099). But in the absence of a provision for parts of books we do not feel justified in holding that a part which might, if a completed book, fall within the provisions of paragraph 518 can, before publication, be admitted free if, when completed as contemplated, it would not answer the descriptive terms of that paragraph.

It becomes unnecessary in this case to approve or disapprove the reasoning of the court in the *Macmillan* case, as the distinction between that and the instant case is clear.

For the reasons stated the decision of the board is *affirmed*.

STROHMEYER & ARPE Co. v. UNITED STATES (No. 1420).¹

FISH PACKED IN OIL AND OTHER SUBSTANCES.

The chemical analysis showed 5.7 per cent oil with these fish in tins. It is immaterial how this oil became present. The additional duty provided in paragraph 216, tariff act of 1913, was intended to reach any case in which oil is part of the substance in which the fish is found packed when offered for importation.

United States Court of Customs Appeals, February 23, 1915.

APPEAL from Board of United States General Appraisers, Abstract 35629 (T. D. 34459).

[Affirmed.]

Allan R. Brown for appellants.

Bert Hanson, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:
Paragraph 216 of the act of 1913 reads as follows:

Fish, except shellfish, by whatever name known, packed in oil or in oil and other substances, in bottles, jars, kegs, tin boxes, or cans, 25 per centum ad valorem; all other fish, except shellfish, in tin packages, not specially provided for in this section, 15 per centum ad valorem; * * *.

The evidence discloses that the fish are prepared by first boiling in oil, when they are put in baskets of wire netting where the oil is allowed to drain off. It would appear from the results attained that the oil is not entirely eliminated from the fish when tomato sauce is added and the fish placed in tin cans and sealed. The sauce is principally tomato sauce, but as found by the board it also contains oil

¹ Reported in T. D. 35175 (28 Treas. Dec., 304).

visible to the eye. The evidence of the Government chemist shows that the sauce contained 5.7 per cent oil, the major portion of which probably consists of vegetable oil.

The importers contend that the goods are dutiable under the second provision of the paragraph for all other fish except shellfish in tin packages at 15 per cent ad valorem, the contention being that the fish are not packed in oil and other substances in the sense that brings them within the provisions of the first clause of the paragraph. The board held, however, that it is immaterial how the vegetable oil became present in the tins; that if, as a matter of fact, the substance in which the fish were found in the tins as packed consisted of oil and other substances, this is sufficient to bring it within the first provision of the paragraph.

We think this is the correct interpretation of the statute; that the purpose was to provide for an additional duty in case oil alone or oil with other substances was used in the preparation of the fish in packing; and that the provision is not aimed at the method of application, but is intended to reach any case in which oil is part of the substance in which the fish is found packed when offered for importation.

The decision of the board is *affirmed*.

GENERAL ELECTRIC CO. *v.* UNITED STATES (No. 1429).¹

PARABOLIC MIRRORS—CAST, POLISHED PLATE GLASS, SILVERED, AND BENT.

The testimony in this case establishes without contradiction that the parabolic mirrors of the importation are cast, polished plate glass, silvered, and bent. They were dutiable with their frames, if any there were, as provided by paragraphs 103 and 104, tariff act of 1909.

United States Court of Customs Appeals, February 23, 1915.

APPEAL from Board of United States General Appraisers, Abstract 36035 (T. D. 34609).

[Reversed.]

McLaughlin, Russell, Coe & Sprague (Robert H. Hillis of counsel) for appellant.

Bert Hanson, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, of counsel), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

SMITH, Judge, delivered the opinion of the court:

At the port of Albany, N. Y., eight parabolic mirrors were classified by the collector of customs as articles of glass, ground and silvered, and assessed for duty at 60 per cent ad valorem under that part of paragraph 98 of the tariff act of 1909 which reads as follows:

98. Glass bottles, decanters, and all articles of every description composed wholly or in chief value of glass, * * * silvered or ground, * * * sixty per centum ad valorem.

¹ Reported in T. D. 35176 (28 Treas. Dec., 305).

The importer protested, first, that the goods were dutiable at 11 cents per square foot and 5 per cent ad valorem as cast polished plate glass, silvered, and bent, under paragraphs 103 and 104 of the tariff act of 1909; second, that they were dutiable at 45 per cent ad valorem as manufactures of glass under paragraph 109; and, third, that they were dutiable either at 10 or 20 per cent ad valorem as nonenumerated unmanufactured or manufactured articles under paragraph 480. The paragraphs upon which the importer actually relied, however, were paragraphs 103 and 104, which, in so far as pertinent to the case, read as follows:

103. Cast polished plate glass, silvered, * * * and looking-glass plates, exceeding in size one hundred and forty-four square inches and not exceeding three hundred and eighty-four square inches, eleven cents per square foot; * * *: *Provided*, That no looking-glass plates or plate glass, silvered, when framed, shall pay a less rate of duty than that imposed upon similar glass of like description not framed, but shall pay in addition thereto upon such frames the rate of duty applicable thereto when imported separate.

104. Cast polished plate glass, silvered * * *, polished * * *, when bent, ground, obscured, frosted, sanded, enameled, beveled, etched, embossed, engraved, flashed, stained, colored, painted, ornamented, or decorated, shall be subject to a duty of five per centum ad valorem in addition to the rates otherwise chargeable thereon.

The Board of General Appraisers overruled the protest and the importers appealed.

The mirrors, duty upon which has been made the subject of protest, have a concave reflecting surface and are designed to be used as reflectors in the manufacture of searchlights. On the hearing, the importers, in support of their contention that the parabolic mirrors or reflectors were cast polished plate glass, silvered, and bent, introduced the deposition of Dr. Freidrich Bernhard Kalkner, of Nürnberg, Germany. This witness deposed that he was chief engineer of the searchlight department of the Siemens-Schuckert Werke, of Nürnberg, and that in that capacity he supervised the manufacture of silvered plate glass with curved surfaces intended for searchlights. He positively declared that from his personal knowledge the merchandise in controversy was made from bent plate glass, polished and silvered. He identified the official sample as truly representative of both the material and physical condition of a piece of parabolic-shaped glass produced by the Siemens-Schuckert Werke, and stated that articles such as those represented by the sample are produced by bringing glass in a metal mold to a plastic condition by the application of heat, in which condition the glass, bent by the force of gravity, assumes the degree of curvature corresponding to the surface of the metal mold. The glass is then annealed and, if found perfect, is polished and silvered.

The witness also stated that the processes employed in manufacturing parabolic mirrors such as those in question are identical with those employed in the manufacture of plate glass, silvered, and having a plane surface, with the exception that in the manufacture of the latter the polishing tools are carried along a plane surface, whereas in the manufacture of the former such tools are applied to a curved surface.

The Government introduced no testimony, and the board's finding that the merchandise imported is not cast polished plate glass, bent, and silvered is apparently based exclusively on the testimony of George W. Wolf, a Government examiner, called by the importers. That witness testified that it was a hard matter to tell whether the piece of glass received in evidence as representative of the merchandise was a piece of plate glass or whether it had been ground down. He said, in effect, that parabolic mirrors were made either by bending plate glass or by grinding a large piece of glass to the "convexity" required and that mirrors made by grinding out the glass to the proper "convexity" were ten times more valuable than those made from plate glass, bent. He declared that a more accurate form could be given to the mirror by grinding than by heating and bending it. He would not say, however, that the mirrors under consideration were not bent, and he was not certain that they were ground to form, although they looked as if they were, but that judging from the invoice price of the goods he was of opinion that the goods were ground parabolic and not plate-glass mirrors. In answer to a question of General Appraiser Fischer as to his understanding of the term "plate glass," Mr. Wolf stated that plate glass is glass which has been first rolled on a large plate and flattened out to an even surface. With nothing more done to it than rolling out, the glass is known as rough plate, but when it has been ground and polished it becomes polished plate glass. To sustain the finding of the board would require us to reject the positive direct testimony of Dr. Kalkner, under whose supervision the mirrors were made and to accept the mere opinion of the Government examiner, who frankly admitted that he could not say whether the official exhibit was plate glass, bent, or glass ground to the form of a parabolic mirror. That course we do not think we ought to take, inasmuch as the testimony of Dr. Kalkner has been neither impeached nor contradicted and is in our opinion wholly consistent with itself and the physical characteristics established by the exhibit in evidence.

The testimony of the Government examiner that plate glass was glass which had been rolled or flattened to a plane surface, that plate-glass mirrors could not be accurately made and would not command the price at which the goods imported were invoiced, and that not one mirror in a hundred was made of plate glass, was, we think,

given more weight by the board than it was entitled to receive. The tariff act itself recognizes that there is such a thing as a cast polished plate glass of which a bent and not a plane surface is the characteristic. The merchandise in controversy, as shown by the uncontroverted testimony of the man under whose supervision it was made, conforms to that tariff description, and consequently the importation ought not to have been excluded from the operation of paragraphs 103 and 104 on a definition which confined polished plate glass to glass which had been rolled to a plane surface and polished. As the Government examiner was apparently unaware of the fact that parabolic mirrors could be and were molded, and that they were produced by the identical processes employed in the manufacture of plate glass with a plane surface, but little if any weight can be given to his estimate of the value of such mirrors or to his statement that plate-glass mirrors are not as accurate as ground mirrors and that not one mirror in a hundred is plate glass. Whether the mirrors were plate glass he admitted he did not know, and whether every point in the same horizontal plane of their concave surface was or was not equidistant from the center he had no means of knowing, and consequently it was not within his province to say that the mirrors were or were not plate glass or that they were not accurately made.

The board not only found that the imported goods were not plate glass, but went further and found that they were glass blown either in a mold or otherwise. Standing alone, the testimony of the examiner might have afforded some slight basis for a finding that the goods were not plate glass, but just how the board reached the determination that the merchandise was some form of blown glass we are at a loss to understand. Certainly there was nothing either in the testimony of the witnesses or in the evidence presented by the exhibit which would warrant any such conclusion.

The contention of the Government that paragraphs 103 and 104 do not cover articles made of plate glass and are limited to such plate glass as is still in the condition of a material we do not think is well founded. Paragraph 103 not only provides for certain sizes of looking-glass plates and cast polished plate glass silvered, but also for such plate glass and looking-glass plates when framed, and that language, we think, is surely broad enough to include a class of finished looking glasses and plate-glass mirrors. Paragraph 104 provides for cast polished plate glass, silvered or unsilvered, when bent, ground, obscured, frosted, sanded, enameled, beveled, etched, embossed, engraved, flashed, stained, colored, painted, ornamented, or decorated, and imposes on such merchandise a duty of 5 per cent ad valorem in addition to the rates otherwise chargeable thereon. That paragraph, it would seem, enumerates about every process to which polished plate glass may be subjected, and, as the extent to which

such processes may be applied does not appear to have been limited, we can not believe that Congress intended that the very complete elaboration provided for should stop at the creation of a material and never achieve the production of a finished article. In our opinion, whether a material or a finished article is evolved by the processes contemplated by paragraphs 103 and 104, the product, if it be within the description of those paragraphs, is subject to the duty therein prescribed.

We think that the testimony in the case establishes without contradiction that the parabolic mirrors under consideration are cast polished plate glass, silvered and bent, and that they are therefore dutiable, with their frames, if any there were, as provided by paragraphs 103 and 104 of the tariff act of 1909.

The decision of the Board of General Appraisers is *reversed*.

UNITED STATES *v.* MEADOWS & Co. (No. 1444).¹

ICED SWEETENED BISCUITS—CONTAINERS—CONFECTIONERY.

These biscuits, surfaced with icing, "contain" the icing and this icing constitutes confectionery. It is not necessary that it should be made up into forms before it can be so classed. They are dutiable under paragraph 194, tariff act of 1913.

United States Court of Customs Appeals, February 23, 1915.

APPEAL from Board of United States General Appraisers. G. A. 7584 (T. D. 34627.)

[Reversed.]

Bert Hanson, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, of counsel), for the United States

Walden & Webster for appellees.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

The protest in this case related to an importation of biscuits, so called, which are claimed to be free of duty under paragraph 417 of the tariff act of 1913, which reads:

Biscuits, bread, and wafers, not specially provided for in this section.

They were assessed for duty under paragraph 194, which reads:

Biscuits, bread, wafers, cakes, and other baked articles, and puddings, by whatever name known, containing chocolate, nuts, fruit, or confectionery of any kind, and without regard to the component material of chief value, twenty-five per centum ad valorem.

The board overruled the protest as to all items embraced therein with the exception of those represented by four exhibits, numbered, respectively, 5, 6, 7, and 8.

¹ Reported in T. D. 35177 (28 Treas. Dec., 309).

Exhibit 5, described on the invoice as "Pantomime," is a mixture of fancy shaped biscuits of various sizes and shapes put up in a glass-surfaced box. Most of them represent figures like initials or animals or heads of animals, and intermingled with these are some surfaced with icing, some of which icing is also pressed into figures in the form of rosettes. As was said by the board, "they are hard and brittle, and, perhaps, might be more accurately described as cookies or small cakes." The icing on those which are iced is of considerable thickness and constitutes a substantial part of the cake.

Exhibit 6 consists of small sweet biscuits of various sizes, with a percentage of frosting or glazing, which might be described also as an icing.

Exhibit 7 represents what is described as "Café noir," a hard oblong biscuit about 1 by 1½ inches in dimensions and three-eighths of an inch thick, having upon one surface the same icing above described.

Exhibit 8, known as "Algeria," is the same as Exhibit 7, except that it is of different shape. These goods are uniform in size and shape and of about the same consistency as "Café noir," "Household," and "Pantomime," and also have an icing over one of the surfaces.

The board, in its opinion, states of this icing:

It is not mixed through the article, and, in our judgment, if separated from the cake and made into various shapes, might properly be termed "confectionery." About 20 per cent of the pieces having been treated in this way, the quantity, in our judgment, would not be negligible; and if, within the meaning of the terms of the statute, this icing is "contained" in the biscuit, this class would be dutiable as assessed. The question whether this surfacing or icing may be considered contained in the commodity is not without difficulty.

The board, after further discussion, held that the icing was not within the meaning of the duty paragraph *contained* within the biscuit, and upon this ground sustained the protest as to the four items above referred to. From this holding the Government appeals.

We think too narrow a view was taken of the word "containing." Paragraph 194 covers the article as imported, and whatever was a part of the article as imported is in the tariff sense contained therein. It is a part of the article. The word "contain" means to include or embrace. The Century Dictionary defines the word—

1. To hold within fixed limits; comprehend; comprise; include; hold.

The definition in Webster's International Dictionary is similar:

1. To hold within fixed limits; to inclose; to hold; hence, to comprise, comprehend, or include.

The definition in Worcester's Dictionary is—

1. To comprehend; to comprise; to include; to embrace.

We think it clear that under these definitions and the ordinary acceptance of the term in the tariff law the words "containing * * *

confectionery of any kind" are broad enough to include any article of which confectionery of any kind constitutes a part.

The chief contention of the importer in this court is that the icing, whether figured or plain, which appears upon these various importations, is not confectionery of any kind.

We think, within the purposes of this legislation, the icing in question constitutes confectionery. It is to be noted that the use of the term in the tariff act is in its broadest sense and so declared by the terms of the statute itself. It includes "confectionery of any kind." The New English Dictionary defines the term "confectioner" as—

2. One who makes confections, sweetmeats, candies, cakes, light pastry, etc.; * * *.

And "confectionery" as—

1. Things made or sold by a confectioner; a collective name for sweetmeats and confections.

The evidence would indicate that the articles involved in this case are such as are usually made and sold by confectioners. This testimony was not offered, it is true, for the purpose of proving the trade term, but to establish the fact that such articles are handled and sold by confectioners. We do not think that within this definition it is necessary that this icing be made up into forms before it can be classed as confectionery.

The decision of the Board of General Appraisers is *reversed*.

UNITED STATES *v.* MILLS & DUFLLOT (No. 1446).¹

LEVER AND GOTHROUGH MACHINES.

Lever and Gothrough machines enumerated in paragraph 197, tariff act of 1909, are machines equipped with a Jacquard attachment. The testimony here is clear and explicit that the hair nets of the importation were not manufactured on a machine of this type nor on a transformed Lever or Gothrough machine, but on plain net machines having their own special names and distinguished by differences of form and mechanical movement. The goods were properly assessable under paragraph 402 of the act.

United States Court of Customs Appeals, February 23, 1915.

APPEAL from Board of United States General Appraisers, Abstract 36066 (T. D. 34629).

[Affirmed.]

Bert Hanson, Assistant Attorney General (*Martin T. Baldwin*, special attorney, of counsel), for the United States.

Brooks & Brooks for appellees.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

SMITH, Judge, delivered the opinion of the court:

Hair nets imported at the port of New York were classified by the collector of customs as silk hair nets made on the Lever or Gothrough

¹ Reported in T. D. 35178 (28 Treas. Dec., 311).

machine, and were assessed for duty at 70 per cent ad valorem under the provisions of paragraph 350 of the tariff act of 1909, which paragraph, in so far as pertinent to the case, reads as follows:

350. Laces, * * * nets, nettings, * * * composed of cotton, silk, artificial silk, or other material (except wool), made on the Lever or Gothrough machine, seventy per centum ad valorem: * * *.

The importers protested that the goods were not made on the Lever or Gothrough machine and claimed, among other things, that they were nets composed of silk, dutiable at 60 per cent ad valorem under the provisions of paragraph 402 of said act, which paragraph, in so far as material to the case, reads as follows:

402. Laces, * * * nets or nettings, * * * all of the foregoing composed of silk, * * * or of which silk is the component material of chief value, * * * sixty per centum ad valorem: * * *.

The Board of General Appraisers sustained the protests, and the Government appealed.

The only point in the case is whether the nets, which are admittedly composed of silk, were or were not made on the Lever or Gothrough machine.

In support of their contention that the nets were not made on the Lever or Gothrough machine, the importers introduced the testimony of Felix Legendre, Louis Ponchon, Louis Poulmarch, and Henry Daumas. The first three of these witnesses testified that they were members of the firms which manufactured the nets sold since January 1, 1910, to Mills & Dufлот and Mills, Dufлот & Co., and that the hair nets in question were not manufactured on Lever or Gothrough machines, but on a plain net machine, known as the "*Grande vitesse*." These witnesses stated that the Lever or Gothrough machine ordinarily works with a Jacquard attachment, and that that feature of the machine distinguished it from the plain net machines, which are always equipped with a cut wheel. It further appeared from the testimony of importers' witnesses that hair nets may be made on the Lever and Gothrough, but that the slowness with which such machines work and the depreciation which such a use produces in the machines themselves make their employment for that purpose commercially impracticable. According to these witnesses, Lever and Gothrough machines are usually transformed by substituting a cut wheel for the Jacquard attachment before they are employed in the manufacture of hair nets. Once transformed, however, the machines operate on a different mechanical principle from that required by the Jacquard attachment, and can no longer be called Lever or Gothrough machines. All three witnesses positively declared that none of the nets were manufactured by Lever or Gothrough looms, whether supplied with the Jacquard attachment

or transformed by substituting a cut wheel for such attachment, and that the machines upon which the nets were actually made were not at all the same thing as a Lever or Gothrough.

It further appeared from the importers' testimony that the Jacquard attachment is a necessary part of the Lever and Gothrough looms, and that when a Lever or Gothrough is transformed it ceases to be known as a Lever or Gothrough.

Henry Daumas testified that the Lever and Gothrough machines were equipped with from 40 to 400 bars, and that the plain net machine required from 2 to 4 bars only. He said that in making hair nets not more than 4 bars are used and generally but 2, but that in weaving a design more bars would be employed, and that the more complicated the design the greater would be the number of bars required. He further stated that all looms work on the same general principle, and that a Lever or Gothrough machine, unless furnished with a Jacquard attachment or transformed and supplied with a cut wheel, would not weave anything. He added that in transforming the Lever and Gothrough to a cut wheel, the fosse or slide must be regulated and the combs and other parts changed.

The Government, on its part, introduced four witnesses, who testified broadly that the Lever and Gothrough machines, transformed by substituting a cut wheel for the Jacquard attachment, were still Lever and Gothrough machines, and that all plain net machines were in truth and in fact neither more nor less than Lever and Gothrough machines and were so known. This evidence, however, was very materially qualified by other statements of the witnesses, as is shown by the following extracts from their testimony:

Francois Beraud:

Q. Describe a Lever machine.—A. It is a lace machine, low speed, *with a Jacquard on the right side*, to make laces and veiling.

Q. What is the difference between Lever machines and Gothrough machines?—A. It is in the catch-bar moving. In Gothrough, it is double; and that is all.

Q. What principles of operation or construction distinguish Lever and Gothrough machines from other net-making machines?—A. The number of steel bars and the suppression of the Jacquard replaced by a cut wheel.

Q. Does the use of a cut wheel instead of a Jacquard take a machine out of the class of Lever and Gothrough machines?—A. It is in the plain net-machine category, but it is always a Lever or Gothrough machine.

Q. Does a machine using a cut wheel come within the operating principle of the Lever or Gothrough machine?—A. *No; because the warp threads are not ordered in the same manner.*

* * * * *

Q. Are you familiar with fast speed (*Grande vitesse*) machines known as Johnson, Sival, Hooton, or Jardine machines?—A. Yes, sir. * * *

Q. What is the significance of the names Johnson, Sival, Hooton, and Jardine?—A. *The movements on the machine are not of the same form.*

* * * * *

Q. Can the Jacquard move any number of bars at one time, according to the design desired?—A. Yes, sir.

Q. Can a moulin or cut wheel move more than two or four bars at one time?—A. No.

Auguste Johnson:

Q. Describe a Lever machine.—A. The Lever is a loom for making veiling, having a certain number of bars in the well (*fosse*) and a Jacquard attachment on the side, used for the manufacture of laces, veils, and armures, but this same loom transformed to obtain more speed by the suppression of almost all the bars, leaving only two to four of them, and suppressing also the Jacquard attachment, is able to weave the plain article, Malines or hair nets, and it is difficult after to make laces again on this loom. *I must say that all the looms can not be so transformed.*

Q. What is the difference between Lever machines and Gothrough machines?—A. That is to say, all comes from the difference in the catch-bar movement, which carries along the carriage, thus permitting a little more speed.

* * * * *

Q. Is a Jacquard attachment a necessary part of a Lever or Gothrough machine?—A. Yes; if you want to weave on this loom veilings, armures, or any fancy article.

* * * * *

Q. Does the use of a cut wheel instead of a Jacquard take a machine out of the class of Lever and Gothrough machines?—A. By means of a cut wheel the loom, being transformed, falls into the category of Lever or Gothrough machines for plain goods.

Q. Does a machine using a cut wheel come within the operating principle of the Lever or Gothrough machine?—A. *No; having replaced the Jacquard by a cut wheel the warp threads are not ordered in the same way.*

Q. Are you familiar with the following machines used in making hair nets: "Plain net machine," "plain net machine with Jacquard," "plain net machine with cut wheel," "fast speed (*Grande vitesse*) machine," "Mechlin machine"?—A. Yes. All this is contained in *two kinds of looms.*

Q. If so, are such machines Lever or Gothrough machines?—A. They are always Lever or Gothrough machines, transformed to make plain nets or hair nets.

Q. Are they known as Lever or Gothrough machines? If so, by whom and under what circumstances?—A. These looms are known by those who use them as Lever or Gothrough machines transformed to make plain net and hair nets.

* * * * *

Q. Are you familiar with fast speed (*Grande vitesse*) machines known as Johnson, Sival, Hooton, or Jardine machines?—A. Yes.

* * * * *

Q. What is the significance of the names Johnson, Sival, Hooton, and Jardine?—A. The shape of the looms is not the same, and neither are certain movements. *Each maker has his own model and movements.*

Joanny Ferret:

Q. Describe a Lever machine.—A. The Lever machine is a loom possessing a Jacquard and a well (*fosse*) large enough to hold a great number of bars for weaving fancy articles.

Q. What is the difference between Lever machines and Gothrough machines?—A. The difference is one of construction, as these looms weave the same thing. It is in the mechanical movement of the catch bars, which permits of a greater average speed.

Q. What principles of operation or construction distinguish Lever and Gothrough machines from other net-making machines?—A. *Lever and Gothrough machines are all*

built to make the fancy articles, and they need a Jacquard and a large number of bars, while the circular machines and the warp looms are not at all similar either as to construction or production.

Q. Is a Jacquard attachment a necessary part of a Lever or Gothrough machine?—

A. To make fancy articles, yes.

Q. If not, what attachment can be used instead of a Jacquard in making hair nets?—

A. The Jacquard can be replaced by a cut wheel.

Q. Does the use of a cut wheel instead of a Jacquard take a machine out of the class of Lever and Gothrough machines?—A. Mechanically, no; but as to weaving, yes.

Q. Does a machine using a cut wheel come within the operating principle of the Lever or Gothrough machine?—A. *As an operating principle the threads are no longer ordered in the same way, and only plain articles can be woven.*

* * * * *

Q. Are you familiar with fast speed (*Grande vitesse*) machines, known as Johnson, Sival, Hooton, or Jardine machines?—A. Yes.

* * * * *

Q. What is the significance of the names Johnson, Sival, Hooton, and Jardine?—A. These are the names of the manufactures of different veiling looms.

J. B. Monnet:

Q. Now, I will go back to my question. What is the difference between a Lever machine and a Gothrough machine?—A. The difference between a Lever and a Gothrough machine is a question of the form of the machine.

* * * * *

Q. Is the movement of the bobbins the same in the Lever machine as in the Gothrough?—A. The catch bar is a little different.

* * * * *

Q. Do you think you classified the Mechlin machine as a Lever or Gothrough machine?—A. That I don't think I must answer now, because I already answered; we had a case before the board.

Q. How did you answer it then?—A. I answered then that the Lever—

Q. My question is, if the board please—A. My answer was that before Levers, every lace machine was run only with one bar; Lever built a machine with two bars and a cut wheel. This machine was called a Lever machine. This machine is in the Nottingham Museum as a Lever machine.

* * * * *

Q. (By General Appraiser FISCHER.) What is the difference between a Lever and Gothrough machine and any other machine, the Mechlin or circular, or anything else?—A. There is a little difference in the catch bar.

* * * * *

Q. As a matter of fact, what you referred to as a special Jacquard is nothing more or less than a cut wheel?—A. It is not a cut wheel.

Q. What is it?—A. With a cut wheel you can not change the work; you must always do the same tissue with the cut wheel, or you are obliged, if you want to change the tissue, to build a new cut wheel; you must change 25 per cent of the loom. What I call a special Jacquard is an arrangement giving a chance to produce all kinds of goods, like hair nets, like—

With the special Jacquard you may, instead of having cards of paper, very delicate to handle, you have a card of iron, and instead of having the holes difficult to punch you have a small screw just to screw so quickly. It can go a very high speed, higher than the cut wheel can go. This Jacquard is a new matter. The only limit to the speed is as fast as the loom itself can run.

From all the testimony in the case and the history of weaving machinery we conclude that prior to the invention of the Lever loom every lace-making machine had only one bar. The original Lever machine was a loom with two bars and a cut wheel. The Gothrough improved the Lever by doubling the catch-bar movement and increasing the speed from 30 to 40 per cent. The Lever and Gothrough were improvements on what was known as the Brown machine, which, in its turn, was an improvement on the loom of Heathcote, who, in 1809, first solved the problem of forming regular meshes by twisting threads one round the other. With the advent of the Lever machine, invention apparently did not stand still, however, and in 1840 the ingenuity of Deverill succeeded in applying to the Lever the Jacquard attachment, which theretofore had been regarded as unsuited for lace-making machines. The application of the Jacquard attachment to the Lever loom meant that as many bars might be moved as the design required, and that of course signified an efficiency for weaving figured laces and fabrics far beyond anything that was possible for one-bar machines or for the original two-bar Lever. We think that the evidence and the history of weaving machinery cited by the Government fairly well establish that the successful application of the Jacquard attachment to the Lever loom was an improvement of that loom and that thereafter the machines ordinarily known as the Lever and Gothrough were those which were equipped with that attachment and which were especially fitted for the weaving of figured goods and other fancy articles. But, however that may be, the evidence puts it beyond debate that the machines upon which the hair nets in controversy were actually woven were cut-wheel machines which bore special names of their own, and which were not designated as Lever or Gothrough machines. True, the Government witnesses do say that all cut-wheel looms were known as Lever and Gothrough machines, but these very same witnesses make it clear that there were plain net cut-wheel machines which were designated as Johnson, Sival, Hooton, and Jardine machines, and which were distinguished one from the other by differences of form and mechanical movements. Indeed, the Government's witnesses did not content themselves with stating that cut-wheel machines differed as to their movements and form, but went further and pointed out that the Lever and Gothrough looms did not order the warp threads in the same manner as the cut-wheel machines and operated on a different mechanical principle.

It is true that the Lever or Gothrough may be *transformed* by eliminating the Jacquard attachment and fitting it with a cut wheel, but in such case it appears from the testimony of the Government's own witnesses that the change is so pronounced that the transformed ma-

chine no longer operates on the principle of the Lever or Gothrough, and that it is difficult ever again to use the loom for the making of laces. It may be that a transformed Lever or Gothrough is known as a *plain* Lever or Gothrough, but that fact can have no pertinency here, inasmuch as the testimony is clear and explicit that the nets in question were not manufactured on a transformed Lever or Gothrough but on plain net machines having their own special names and distinguished from the Lever or Gothrough by differences of form and mechanical movement. To denominate plain net machines as Lever and Gothrough machines simply because the original Lever was fitted with a cut wheel would imply that the cut-wheel machine of to-day is identical with the original cut-wheel Lever of a hundred years ago, and that we are not prepared to hold, inasmuch as it affirmatively appears that cut-wheel machines are not designated as Lever or Gothrough machines, and that they are distinguished not only by different names but also by differences of mechanical operation and, consequently, of mechanism.

In our opinion paragraph 350 was not designed by the Congress to protect domestic weavers of laces, nets, nettings, etc., against the product of cut-wheel looms capable of moving from 2 to 4 and possibly 6 bars, but against the tremendous efficiency of Lever and Gothrough machines improved by the Jacquard attachment and thereby made capable of moving any number of bars and consequently of weaving all classes of figured fabrics, however complicated the design might be. This view, we think, is fully confirmed by the fact that paragraph 197 of the same tariff act provided that Lever and Gothrough machines should be admitted free of duty. The evident intention of that provision was to encourage the importation of high-grade machines and thus permit the American manufacturer to meet foreign competition in the production of fabrics which could not be manufactured to advantage on looms of an inferior or less efficient type. In fact, it affirmatively appears from the record that the Government has classified as Lever or Gothrough machines only those equipped with the Jacquard attachment and that cut-wheel machines have been denied free entry under the provisions of paragraph 197. In that behalf E. H. Weldon, examiner of machinery at the port of New York, who acts in an advisory capacity for the classification of machinery for his home port and other ports of the country, testified that since the passage of the tariff act of 1909 he had classified as Lever or Gothrough machines only those equipped with a Jacquard attachment, and that no machine without that attachment had, to his knowledge, been admitted free of duty at any port to which he made returns. Weldon's conclusion as to the machines which might be properly classified as Lever or Gothrough machines seems to have been approved by the board in the matter

of the protest of the American Express Co., Abstract 31424 (T. D. 33217). The testimony of Weldon, of course, can not be regarded as establishing a long-continued departmental practice. Nevertheless, from the passage of paragraph 197 until the trial of the pending issue Weldon was the customs official charged in large measure with the duty of examining and finally reporting on the classification of machines for the making of laces, nets, and nettings. Only those machines equipped with the Jacquard attachment were classified by him as Lever or Gothrough machines. Apparently his returns were uniformly approved by the collectors to whom they were made, and from that we conclude that his testimony as to the classification of such merchandise must be accepted as some evidence tending to support the decision of the board and the contention of the importers that a Lever or Gothrough machine means a machine equipped with a Jacquard attachment. If the Lever and Gothrough machines enumerated in paragraph 197 are those which are equipped with a Jacquard attachment, and we think they are, it follows that the laces and nets provided for in paragraph 350 must be made on Lever and Gothrough machines having that attachment, inasmuch as it seems clear to us that both paragraphs refer to the same machine.

The decision of the Board of General Appraisers is *affirmed*.

UNITED STATES *v.* MYERS & Co. *et al.* (No. 1476).¹

SAWED AND DRESSED BOARDS WITH ORNAMENTAL BEADING.

The question is whether the beading which appears upon the ceiling lumber and upon some of the Novelty siding serves to exclude the importation from proper classification as "not further manufactured than sawed, planed, and tongued and grooved," paragraph 647, tariff act of 1913. The planer and matcher used in dressing sawed boards is, in fact, simply a planing machine, and its work is simply planing, whether the boards are or are not beaded in the process. "Planing" includes beading, the beading giving the boards no new name, character, or use. The free-entry clause applies.

United States Court of Custom Appeals, February 23, 1915.

APPEAL from Board of United States General Appraisers, Abstract 36765 (T. D. 34871).

[Affirmed.]

Bert Hanson, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, of counsel), for the United States.

Allan R. Brown for appellees.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MARTIN, Judge, delivered the opinion of the court:

The present merchandise consists of sawed and dressed boards which were imported under the tariff act of 1913.

¹ Reported in T. D. 35179 (28 Treas. Dec., 318).

The collector assessed the same with duty at the rate of 15 per cent ad valorem under the provisions of paragraph 176 for manufactures of wood not specially provided for.

The importers filed their protest against the assessment, claiming free entry for the lumber as boards not further manufactured than sawed, planed, and tongued and grooved under paragraph 647 of the act.

The protest was submitted upon evidence to the Board of General Appraisers and was sustained, from which decision the Government now appeals.

The following is a copy of the two paragraphs of the act of 1913 which are thus brought into question:

176. House or cabinet furniture wholly or in chief value of wood, wholly or partly finished, and manufactures of wood or bark, or of which wood or bark is the component material of chief value, not specially provided for in this section, fifteen per centum ad valorem.

(Free List.) 647. Wood: Logs, timber, round, unmanufactured, hewn or sawed, sided or squared; pulp woods, kindling wood, firewood, hop poles, hoop poles, fence posts, handle bolts, shingle bolts, gun blocks for gunstocks rough hewn or sawed, or planed on one side; hubs for wheels, posts, heading bolts, stave bolts, last blocks, wagon blocks, oar blocks, heading blocks, and all like blocks or sticks, rough hewn, sawed, or bored; sawed boards, planks, deals, and other lumber, not further manufactured than sawed, planed, and tongued and grooved; clapboards, laths, pickets, palings, stakes, shingles, ship timber, ship planking, broom handles, sawdust, and wood flour; all the foregoing not specially provided for in this section.

The present issue, therefore, is whether the boards in question have been further manufactured than sawed, planed, and tongued and grooved. If this question be answered in the negative, then the importation is concededly entitled to free entry.

The imported boards vary somewhat in dimensions, but in a general way they may be said to be about 12 feet in length, 6 inches in width, and 1 inch in thickness. They consist of two classes. One class is designed for use as inside ceiling; these boards are tongued and grooved, and have plain smooth sides except for two half-round beads which extend the length of the boards, one at the edge and the other midway between the two edges. These beads are ornamental only; when the boards are in position each has the appearance of being in fact two narrow boards instead of a single wide one. The other class of imported boards is called "Novelty" siding, and is chiefly used as siding for frame buildings. These boards ordinarily have no ornamental beads upon their surface like those just described, nor are they tongued and grooved. Their edges are designed to overlap one another when in position, and for this purpose the lower edge of the upper board is cut to a rabbet, while the upper edge of the lower board is cut with a concave or cove effect so that it may fit into the rabbet. The outer side of these boards is

generally smooth and level, except for a so-called cove or concave cut which extends for a distance from the edge of the board. The object of the cove is thus seen to be chiefly utilitarian, since it forms part of the rabbet joint; nevertheless it is cut so as to be partly ornamental also. In some instances boards of this kind carry also the ornamental beads above described; in such case they are treated in this case as belonging to the class of beaded lumber rather than that of ordinary Novelty siding.

The two classes of boards just above described were alike refused free entry under paragraph 647, *supra*, and were both assessed with duty as manufactures of wood under paragraph 176, *supra*. Nevertheless the court is advised that the Government does not contend for the assessment of the ordinary Novelty siding, but limits its present claim to the beaded lumber alone. This statement is authorized in part by the ruling of the Treasury Department (T. D. 34178), issued February 11, 1914, in which the paragraphs in question were discussed, with the following conclusion:

While it is difficult to establish a well-defined line of demarcation between lumber which is dutiable as manufactures of wood under paragraph 176 of the tariff act and lumber which falls within the provisions of paragraph 647 of the said act, the department is of the opinion, in view of the decisions cited and giving due consideration to the purpose of the present tariff act, which is to reduce duties, that flooring, although in addition to being planed and tongued and grooved, is plowed on the underside to insure a perfect fit to the board as flooring, is not excluded from classification under paragraph 647. The department is also of the opinion that ordinary Novelty siding, ordinary window-parting strips, outside baseboards, ordinary siding, and other articles which are not molded or beaded are entitled to admission free of duty under paragraph 647.

Articles such as sash rail, stair rail, crown molding, nosing, molded baseboard, beaded Novelty siding, O. G. molding, signboard molding, and similar articles, when beaded or molded, are, in the opinion of the department, properly dutiable as manufactures of wood at the rate of 15 per cent ad valorem under paragraph 176 of the tariff act.

The foregoing statement therefore limits the present issue to the question whether the beading which appears upon the ceiling lumber and also upon certain of the Novelty siding, withdraws such merchandise from the classification of lumber "not further manufactured than sawed, planed, and tongued and grooved." In seeking to answer this question recourse may be had first to the testimony of the witnesses, and next to the definitions given by the lexicographers.

According to the testimony, such lumber as is herein involved is first sawed into boards of suitable dimensions. The boards are then run through a machine which is called a planer and matcher. This machine operates four rotating cylinders, each of which is equipped with certain cutting knives. The four cylinders are set in a rectangular position, and as the boards are fed into them the knives dress the

four sides of the boards at the same time and by the same operation. The knives are removable from the cylinders; they come in many different shapes, which may be diversely adjusted therein. Therefore, as a board passes through the cylinders the two edges may be tongued and grooved or planed smooth, while at the same time the two sides may be planed entirely smooth, or partly smooth but with the cove effect and either with or without the bead effect. That is to say, it depends upon the adjustment of the knives upon the cylinders as to the form of the four surfaces of a board when it issues from the cutting cylinders, for the knives may be set to suit the various purposes of the operator. The operating machine is called a planer and matcher because of its four cutting cylinders, whereby the edges of boards are "matched" at the same time that the sides are dressed. The edges are said to be "matched" whether they are planed perfectly smooth or are rabbeted or are tongued and grooved. There is also a machine in common use called a "surfacer," having but two cutting cylinders, by means of which only the two sides of the boards are dressed at a single operation. Such machines also may be adjusted so as to cut beads along the boards, but this would require considerable trouble and would be unusual in practice. Boards such as those now in question are practically always finished by means of the planer and matcher, that being the most speedy and economical process.

The record contains the testimony of 12 witnesses, all of whom were familiar with the processes which have just been described and familiar also with the terms in general use in the wholesale lumber trade in this country. The witnesses without exception testified that the planer and matcher above described is in fact simply a planing machine; that the work done by it is in fact simply planing, whether the boards be beaded or not; and that the word "planing" is uniformly used by the wholesale trade in this country as a generic term broad enough to comprehend all of the operations above described. This testimony in relation to trade usage was not designed to prove a peculiar commercial definition of the term "planing" but was submitted upon the claim that the trade usage of the term is identical with that which is adopted by common acceptance. The following extracts from the testimony are pertinent to the foregoing statements:

Morris H. Gatchel:

Q. What is a planer and matcher?—A. It is a machine having a top and bottom head and two side heads.

Q. What do those heads carry?—A. The top and bottom head will carry a planing knife which makes a planed surface.

Q. They carry knives, do they, the top and bottom heads?—A. Yes, sir.

Q. And the side heads also?—A. Yes, sir; or they will carry a knife that will make a groove or cut. The two side heads make a tongue and groove only.

Q. (By General Appraiser McCLELLAND.) Are these effects all produced by one process?—A. Yes, sir.

Q. (By Mr. STRAUSS.) Does the difference in the effect, whether it be in the shape of a bead or of a larger groove, require any additional operation?—A. No, sir.

Q. Are the effects produced by the difference in the position of the knives and also in the difference in the shape of the knives?—A. It does not require either additional labor or additional machinery to do it.

Q. It lies merely in the adjustment and shape of the knives, does it?—A. Exactly.

* * * * *

Q. Is the operation of beading, as described by you, a planing process?—A. Yes, sir.

Q. Is the operation of tonguing and grooving a planing process?—A. Yes, sir.

Q. Is the operation of coving a planing process?—A. Yes, sir.

William R. Crombie:

Q. Is the operation of putting the lumber through the planer and matcher a process of planing or sawing or augering, or what? What is the process?—A. It is planing.

Q. Anything further than a planing process?—A. No; nothing.

Q. Does the fact that this bead was produced at the same time that the smooth surface was produced, or that the bead was produced at the same time that the deep cut in Exhibit F was produced, change it in any respect?—A. No.

Q. What use is it put to, Exhibits A to F?—A. Oh, that is used for partitions, fencing, siding, and barns.

Q. Use the same as Exhibit Z, the nearest one to you, is put?—A. Yes; the same use.

Q. (By Mr. Wood.) In what sense do you use the term planer or planed?—A. A planer?

Q. The term planed.—A. Planed is running through a surfacer, planer, and the matcher. It is a generic term.

Q. Is it the same thing whether it is run through a surfacer or whether run through a planer and matcher?—A. It is all planed lumber.

William Bennett:

Q. Whether the lumber be cut in the form as shown by Exhibit Z or whether it be in the form of any of the other Exhibits A to F, does that undergo any other operation?—A. No, sir; it is all done in the one operation of the planer and matcher.

Q. And is there anything in that operation other than a planing operation?—A. No, sir.

Q. What kind of an instrument is used for the removal of the surface to produce these effects?—A. A planing knife.

Q. Are they all planing knives used in the planing and matching machines?

Mr. Wood. Objected to as leading.

A. Yes, sir; planing.

Q. Matching?—A. Yes, sir.

Q. Have they specific names as well as knives, do you know?—A. Oh, yes.

Q. And what are those names?—A. Planing, beading, matching.

Q. But whatever their several names may be, are they or are they not all planer knives?—A. They are all planer knives.

Q. To what uses are Exhibits A to F put?—A. Such as the—that is, used for siding, fences, partitions.

* * * * *

Q. Are those descriptions of beading, tonguing and grooving, coving, rabbeting, and other words that I can not think of at the moment, merely descriptive of the design in which the planing is to be done?—A. Merely descriptive of the designs.

It thus appears that according to trade usage the word "planing" is a generic term which includes the beading process now in question. The following authorities sustain the claim that this definition of the term is the common and ordinary one in daily speech:

Standard Dictionary:

Plane.—A tool used to produce a plane surface. * * * Planes for shaping, cutting, etc., are named * * * . (2) From their use or purpose, or the object made or involved; as * * * grooving plane (having a bit for making channels in wood). * * *

Bead plane.—A plane for working bead moldings of a fixed size.

Century Dictionary:

Plane.—A tool for paring, smoothing, truing, and finishing woodwork. * * * Planes are made in a great variety of shapes and sizes, and range from 1 to 72 inches in length. Nearly all are distinguished by names having reference to the particular kind of work for which they are designed, as the *edge plane*, *molding plane*, and *smoothing plane*.

Bead plane.—A form of plane used for cutting a bead. The cutting edge of the plane iron is a semicircle with diameter equal to the diameter of the required molding.

Knight's American Mechanical Dictionary:

Plane.—(Woodworking.) A carpenter's cutting and surface-smoothing tool, of which there are many varieties, called from some peculiarity of construction or purpose.

Bead plane.—(Carpentry.) A molding plane of semicylindric contour, generally used in sticking a molding of the same name on the edge or on the side close to the aris. A set consists of nine planes, each working a half-round of given radius.

It may be said in conclusion that the witnesses in this case uniformly testified that the beading process in question is in fact a species of planing, and that the trade always uses the term in that sense; furthermore, the dictionaries and similar authorities without exception define the word "planing" so as to be inclusive of such beading as that in question in this case. It should therefore be assumed that Congress intended the term to bear that meaning in paragraph 647, *supra*, unless something in the legislative history of the subject or in the context of the paragraph would require a different interpretation.

The Government contends that the addition of the words "and tongued and grooved" in the classification implies that Congress had not used the term "planed" in the generical sense claimed by the importers, for the descriptive words "tongued and grooved" would have been wholly unnecessary if the preceding term "planed" already included that process. The Government therefore claims a more restricted interpretation, such as would not include such processes as beading or tonguing and grooving, within the meaning of the word "planed." In answer, however, it may be said that Congress used the terms "and tongued and grooved" in the classification as words of specification and not as words of extension. It

must be conceded that this is not uncommon in tariff legislation. This construction is favored by the fact that one purpose of the act was to reduce tariff duties, and that such beaded boards as those now in question are essentially similar in character to ordinary Novelty siding boards, which are concededly covered by the disputed classification. They are alike common materials for plain building purposes, and they are produced by the same essential operation. It does not seem reasonable that the use of a beading knife in the planing process should alone deprive the boards in question of free entry under paragraph 647 and make them dutiable as manufactures of wood not specifically provided for under paragraph 176. It is true that the beading process serves an ornamental purpose, but upon the other hand, the extended coves upon Novelty siding are likewise ornamental in character, for such boards could well be fitted with rectangular joints. The beading of the boards seems to add nothing to their cost, nor does it give them a new name, character, or use. They are simply lumber which has been planed in a well-known manner and has not been advanced beyond the condition of planed boards.

The decision of the board is therefore *affirmed*.

HERZ & Co. *et al.* v. UNITED STATES (No. 1424).¹

INSULATORS FOR SPARK PLUGS MADE OF GERMAN LAVA.

There appears to be no real conflict between the record in the *Kraemer* case, Abstract 30481 (T. D. 32943), and the testimony in *United States v. Morris European & American Express Co.* (1 Ct. Cust. Appls., 300; T. D. 31356). The sample in the present case was stipulated as the same with that in the two named cases. Proof that an article is talc does not disprove the collector's return that the article is porcelain; and no satisfactory disproof of return in this case having been made, its correctness stands unimpeached.

United States Court of Customs Appeals, March 3, 1915.

APPEAL from Board of United States General Appraisers, Abstract 35775 (T. D. 34521).

[Affirmed.]

Allan R. Brown for appellants.

Bert Hanson, Assistant Attorney General (*Charles E. McNabb*, assistant attorney, of counsel), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

DE VRIES, Judge, delivered the opinion of the court: :

Appeal from two decisions of the Board of General Appraisers, covering a number of protests affecting importations of insulators for spark plugs assessed as and held by the collector to be "undec-

¹ Reported in T. D. 35192 (28 Treas. Dec., 839).

orated porcelain." These protests were submitted before the Board of General Appraisers upon records made in two other cases, the sample therein, and a stipulation that the sample herein is substantially the same as that the subject of decision in those two cases. In each case the board states:

The testimony in *United States v. Morris European & American Express Co.* referred to * * * was taken before the Board of United States General Appraisers in January, 1910, and decided by that tribunal in April, 1910. The testimony in the case of *F. L. Kraemer & Co.*, 577230, was taken before the Board of United States General Appraisers in May of 1912, and decided by that tribunal in November, 1912. The importer interested in the classification was not the same in the several cases, nor was the attorney representing the importer, and the conclusion reached by the Board of General Appraisers in the one case was different from that reached by the Court of Customs Appeals in the other. In *Kraemer's* case the Government offered no testimony and the decision was based largely upon the analysis of the material made by the Government chemist. In the *Morris European & American Express Co.* case elaborate testimony was offered by the importer, also by the Government. Taking the testimony in the two cases together they present an irreconcilable conflict. Upon such a record we are unwilling to attempt to definitely determine the classification of the merchandise in question. The protest is therefore overruled without affirming the action of the collector.

A close examination of the records in these cases fails to convince us that "taking the testimony in the two cases together they present an irreconcilable conflict." This allusion, of course, refers to the testimony and not the conclusions of law in the respective cases. In neither case was the record in a satisfactory condition, and in both cases it is apparent that a more satisfactory record could have been presented to the board and this court to the end that the issue presented might have long since received a final determination. There is sufficient, however, in these records to make it certain that these importations are insulators for spark plugs made of a material commonly known as German lava, which is susceptible of chemical analysis and has been so analyzed.

The first case was that of *Morris European & American Express Co.* (1 Ct. Cust. Appls., 300; T. D. 31356). The record in that case, as stated, is made a part of the record in these cases. There was no chemical analysis admitted in evidence in that case, and the exact composition of the material out of which the spark plugs were made was the subject of considerable testimony. The appraiser had reported to the collector and the collector had decided and returned to the board that "*the spark-plug insulators consist of undecorated porcelain.*" At the hearing before the board two witnesses testified upon behalf of the importers. One of them, Mr. Gustav L. Herz, of the appellant firm in this case, testified that the merchandise was made of mineral lava; that the material from which these articles were made was "mellilite"; "mellilite is a form of lava"; that it was "made out of the mineral called lava"; "that he had tried to make them

out of the crude material, but could not because of the want of experience." The next witness, Mr. Moritz Kirchberger, was the only witness who testified in the case who seemed to possess any positive or satisfactory knowledge of the real component materials of the imported article. He testified:

Q. What is that?—A. The commercial name under which this has been known for the last 40 or 50 years is lava, a chemical composition, the result of magnesia and water.

* * * * *

Q. You described this as an article made out of the material called German lava?—

A. Yes, sir; that is the principal part.

Q. Do you mean to say this article is cut out of lava, pieces of so-called German lava, or is it made as a composition of something having German lava in it?—A. It is a composition.

Q. And it has other materials besides lava?—A. It has other materials besides lava.

Q. Is it subjected to any process of turning or molding in any way to get it into its present form?—A. Why, yes.

Q. It is?—A. It is.

Q. Is it fired after that?—A. It is.

Q. Do you know what that other material is?—A. It is some oxide of magnesia in there, and there are some alkalies put in there, and, I don't know, a few other things. The main substance is the waste material they bring in from the factory.

Q. (By Judge SOMERVILLE.) What is the article of chief value, if you know?—A. The chief value is the silicate of magnesia, this here Exhibit B, in a crushed and ground state.

* * * * *

Q. Coming back to what you said about the way the Exhibit 1 is made out of ordinary German lava, look at this Exhibit F. That is a powdered state of German lava?—

A. It is not yet crushed, it is just the pure waste; and this again will be crushed, to be used at all, be crushed further. It is the pure waste as it falls off the pieces when they are sawed.

Q. Exhibit 1 is made out of the Exhibit F, with the addition of the other materials you have mentioned?—A. With the addition of the other materials I mentioned.

Q. Is it necessary to prepare the body with any degree of care?—A. I think that somebody ought to know somewhat about it to do it properly.

Q. You know about the way it is made?—A. I have seen them make it; it looks very simple.

Q. After it is drilled I understand you to say it is fired?—A. It is fired.

Q. In the same kind of kilns as the porcelain is fired in?—A. I have never seen porcelain fired.

Q. (By Judge WAITE.) Is that made in a mold?—A. These are made in a mold; yes, sir.

* * * * *

Q. To your knowledge, the only term or name which has been applied to the Exhibit C commercially all the years you have been acquainted with it is "lava"?—A. Not only. It has another name, "withamite," which the manufacturer frequently gives it and which is occasionally used.

Q. Is it not a fact that this name "lava" as applied to the Exhibit C is the name applied by you alone, or have you heard it applied by others?—A. That name is applied by anyone who handles that class of goods.

It is made clear from the record that Mr. Kirchberger's testimony as to chief value referred to quantity and not to price.

The Government in that case introduced a record wherein several witnesses testified that insulators for spark plugs in this country were made of porcelain.

Upon this record the Board of General Appraisers made no finding of fact, but stated "from the testimony it is apparent that it is not lava, but exactly what the substance is or what is added to it in the manufacture of these articles in question is not distinctly shown." The board thereupon proceeded to decide the case upon the assumption that the articles were porcelain, holding, however, that they were not within the provisions of paragraph 97 of the tariff act of 1897 for the reason that they were not decorated. Upon appeal to this court the same assumption was made by the court, to wit, that the articles were porcelain and the case decided upon the point of law involved in the statement that "the material obviously being within the subject of paragraph 96, *the only issue in the case* is whether or not the article as imported is susceptible of decoration." A careful review of the fragmentary testimony in that case is convincing that this court could have taken no other view upon the record. The importers were in court controverting and seeking to overthrow the decision of the collector made upon the report of the appraiser that the articles were "undecorated porcelain." The decision was presumptively correct and the burden was upon the importers to disprove the same. The importers' testimony not only did not disprove or overthrow the presumption attending the correctness of the return of the collector, but tended under the accepted authorities to support it. Aside from the testimony that the merchandise contained large quantities of silica there was the positive statement of the importers' witness that it was withamite. Withamite is epidote, which is a silicate aluminum, iron, and calcium, well-known porcelain components. See "A Treatise on Ceramic Industries," by E. Bourry (p. 50). As found by the board there was no testimony disproving the collector's return.

The case of Kraemer, Abstract 30481 (T. D. 32943), referred to in the board's opinion, was a board case. But one witness was called. The collector had returned upon the report of the appraiser that the merchandise was "undecorated porcelain." The following questions and answers followed:

Q. (By Mr. BROWN.) Are you familiar with the material out of which the insulator is made?—A. Yes, sir.

Q. What is it?—A. It is a soapstone composition.

Q. The Government says lava composition?—A. It is called lava in the trade, the same as the gas burners are called lava tips.

Q. It is not the real lava that comes from the volcano?—A. No. In fact, it is soapstone.

Q. (By Mr. ROBERTSON.) What do you really know about the material—how are you able to state what you have just told Mr. Brown?—A. These insulators are made by the same people who make the gas burners, the so-called lava burners.

Q. Yes; but what I want to know is how you personally know that this is made from the material you mentioned. I think you said soapstone, did you not?—A. Yes.

Q. How do you know that?—A. I learned it from the manufacturer.

Q. That is the only information you have?—A. Yes.

This testimony, as stated, was hearsay. Nevertheless, as we shall hereafter see, it is not in conflict with the assumption of the court and board or the testimony in the Morris European & American Express Co. case. A sample of the merchandise was then admitted in evidence and submitted to the chemist at the United States laboratory, appraiser's office, New York, N. Y., who reported that it consisted of "silica, magnesia, iron oxide, alumina, traces of lime. Constitutes talc." This analysis came into the record upon an express reservation by the Government counsel that an opportunity should be afforded to cross-examine the Government chemist as to this report. No such examination, however, was ever had and the board was left with the hearsay testimony stated, and the analysis and collector's decision to determine the facts in the case. There was nothing in this record not reconcilable with the decision of the collector.

The same testimony and the same report, without any further elucidation for the benefit of either the board or this court, appear in this record.

In the light of well accepted authorities not only the enumerated elements of this sample, but talc, are all of the essential materials from which porcelain is made. And, as we view it, both records are for reasons hereinafter given reconcilable with the view that the composition of this importation is porcelain. Nor does this concede that they are not stoneware within the statute.

As we have stated the analytical components of the sample in the Kraemer case, which it is here stipulated is the same as the sample in this case, whether they be as enumerated or as constituting talc can be and are used in the manufacture of porcelain. It follows that the naked proof of the fact that an article is talc, or of these components, does not disprove the return of the collector that an article is porcelain. The highest authorities upon the subject of porcelain agree with and support this statement. Thus the well-recognized authority, Bourry, in the work entitled "A Treatise on Ceramic Industries," at page 33, in his classification of various raw materials used in ceramics, speaks of "(a) materials *similar to clay* which can be substituted for it *either entirely or in part*," and enumerating therewithin "talc or steatite * * * found in the soft friable rock, of slight plasticity. * * * It has been employed for the manufacture of large ceramic vases. Magnesite has been used in Spain for the manufacture of porcelain." And, further (p. 52), in speaking of the plastic bodies, talc again appears as a composition

in the manufacture of ceramics. Likewise, at page 179, where the firing is treated of in the making of ceramics and the requisite temperature for the various materials so used, talc is enumerated. More exactly to the point is the Dictionary of Applied Chemistry, by Thorpe (vol. III), wherein, speaking of steatite, it is defined as—

A massive or schistose variety of talc, more or less impure, known popularly, from its unctuous feel, as *soapstone*. * * * *Steatite is sometimes used in the manufacture of porcelain*, and the veins of the mineral in the serpentine of the Lizard, in Cornwall, were formerly quarried for supplying the china works of Bristol.

So that it is made obvious from the proof in the record and these highly accepted authorities that the showing in these cases against the returns of the collector that this merchandise was porcelain not only did not controvert but corroborated the returns. Particularly is it true that in the Kraemer case the record did not necessarily conflict with the testimony in the Morris European & American Express Co. case, nor did it in any substantial way dispute the conclusion reached in that case, but rather tended to affirm it.

So far as shown, therefore, by this record, no satisfactory disproof of the collector's return having been made, its correctness must stand as unimpeached, and, since the decision of the board does not disturb it, that decision is *affirmed*.

UNITED STATES v. LINES & WARNE (No. 1453). UNITED STATES v. HENSEL, BRUCKMANN & LORBACHER (No. 1454).¹

SILK MUFFLERS WITH A FRINGE EFFECT.

With these mufflers the threads are in all cases introduced to perfect and hold in place the overwhelmed and overlapped edges and are necessary as well for ornamentation. Being necessary to complete the hemming process or its equivalent, this can not be said to be a process beyond hemming; and the threads holding the individual pieces together being cut, the merchandise was brought within the provisions of paragraph 400, tariff act of 1909.

United States Court of Customs Appeals, March 3, 1915.

APPEAL from Board of United States General Appraisers, Abstract 36162 (T. D. 34668).

[Affirmed.]

Bert Hanson, Assistant Attorney General (*Martin T. Baldwin*, special attorney, of counsel), for the United States.

McLaughlin, Russell, Coe & Sprague (*Edward P. Sharretts*, of counsel) for appellees

Before MONTGOMERY, BARBER, DE VRIES, and MARTIN, Judges.

DE VRIES, Judge, delivered the opinion of the court:

This appeal brings here for review two decisions of the Board of General Appraisers. It is the third time that the same merchandise

¹ Reported in T. D. 35193 (28 Treas. Dec., 344).

has been before this court for a decision as to its proper classification, each case, however, involving different points. The provisions under consideration are paragraphs 400 and 402 of the tariff act of 1909, which, so far as pertinent, read:

400. Handkerchiefs or mufflers composed wholly or in chief value of silk, finished or unfinished, if cut, not hemmed, or hemmed only, shall pay fifty per centum ad valorem; if such handkerchiefs or mufflers are hemstitched or imitation hemstitched, or revered, or have drawn threads, or are embroidered in any manner, whether with an initial letter, monogram, or otherwise, by hand or machinery, or are tamboured, appliqué, or having tucking or insertion, sixty per centum ad valorem.

402. Laces, * * * fringes, * * * clothing ready-made, and articles of wearing apparel of every description, including knit goods, made up or manufactured in whole or in part by the tailor, seamstress, or manufacturer; all of the foregoing composed of silk, * * * or of which silk is the component material of chief value, * * * sixty per centum ad valorem: *Provided*, That articles composed wholly or in chief value of any of the materials or goods dutiable under this paragraph shall pay not less than the rate of duty imposed upon such materials or goods by this section: * * *.

In *Kaskel & Kaskel et al. v. United States* (4 Ct. Cust. Appls., 38; T. D. 33264), the sole question presented to and decided by the court was whether or not paragraph 400 included for dutiable purposes knit as well as woven mufflers. The court, reversing the board, held that both were included. The second appeal was from a decision rendered at the same time by the board, but withheld from review by this court until appellate decision as to the first was reached. Thereupon the second appeal, *Hensel, Bruckmann & Lorbacher et al. v. United States* (4 Ct. Cust. Appls., 486; T. D. 33914), was presented to the court for decision. The cases were presented upon the same record. The goods were aptly described by the court in *Kaskel & Kaskel et al. v. United States*, *supra*, as—

Finished silk fabrics, cut, not hemmed, and designed to be worn by men about the neck for the purpose of protecting the throat from cold and the linen of the wearer from soiling. The articles are made on a knitting machine and are knitted in lengths of from 10 to 60 yards. These lengths are cut to the proper size and are then passed through what is known as an overwhelming machine, which stitches the borders, and thus protects the fabric from unraveling. In size, shape, and use the completed manufacture conforms to the modern and popular understanding of a muffler. Indeed, according to the testimony, it is so known to the trade.

While women's mufflers are also involved here, there is no difference in their methods of construction and no differentiation is claimed.

The Government in the second appeal aforesaid contended that the processes applied by the overwhelming machine, together with the so-called fringe effect given the imported articles, constituted such advancement in the manufactured condition of the importations as to take them beyond the limiting description in paragraph 400 of "mufflers * * * finished or unfinished, if cut, not hemmed or hemmed only." The court found itself embarrassed by the meagerness of the record, but being satisfied that the importers had brought

themselves within the provisions of paragraph 400 upon the record as a whole when read in connection with the exhibits reversed the decision of the board upon the authority of the previous decision in *Kaskel & Kaskel et al. v. United States, supra*. The court, however, observed:

If the overwhelming, whatever it is, is not hemming, then these are of course not hemmed, and a question might be made whether the tied-in silk threads were more than the mere finishing which the words "finished or unfinished" in the paragraph imply. We think all this can and ought to be more fully explained by testimony, which, perhaps, would be expert or technical in its nature, and that it is fair neither to the court nor the importers to ask us to make a finding on so material a question upon the exhibits alone.

Therefore, acting upon this observance of the court, a new record was made up which is presented to the court by these appeals. The Board of General Appraisers sustained in these cases the contention of the importers upon the authority of the previous decisions of the court and the additional testimony adduced, which the board held to have confirmed in its opinion the correctness of the previous views of the court. The Government appeals.

The first contention made by the Government here, as it was before the board, is that this merchandise is not "cut," or at least that one class of it is not cut, by reason of the fact that in the knitting of the goods the warp is broken by mechanical process and the respective pieces held together by a single thread applied in the knitting process, whereby the respective pieces intended for individual mufflers are continued in the knit piece of from 10 to 60 yards in length. They come through the knitting frames in this condition as piece goods, and the testimony of all the witnesses is that in order to complete segregation and preparation for the subsequent overwhelming and hemming processes not only must the individual thread be twice cut in all cases, but what also seems shown there must in addition be a cutting of the loop threads in the individual pieces. The statute prescribes no number of threads which must be cut in order to bring the merchandise within its terms. Whatever the number of threads that hold the respective individual pieces together, they effect the same service, and before they become individuals cutting is necessary. We agree with the board in its conclusion that this cutting, which constitutes a severing process of the individual mufflers, is sufficient within the statute whether it be of one or more threads, the effect and result being the same.

While in the earlier cases it was contended that the overwhelming process was not equivalent to hemming as used in the statute, this position is abandoned by the Government in these appeals. It is expressly stated by the Government in its brief (p. 9):

Of course a finishing such as that of "overwhelming," or any similar binding of the edge to prevent unraveling, does not remove the muffler from the provision in question, for that makes a less advanced form of muffler than the hemmed article.

So that question is removed from these appeals. It appears from the record, however, that as to one of the samples the overwhelming process was not employed, but another to effect the equivalent purpose. It seems that as to that sample and class of merchandise the end was laid over and under so as to conceal the cut edge and basted down with long stitches much in the manner of a hem. Then in all cases the so-called fringe effect is produced by assembling a number of silk threads within a needle, whereupon this collection of threads is by hand run through the looped ends of the fabric, made by the described overlapping or the overwhelming process, and then tied in a slipknot and drawn taut. Thereupon in each case they are clipped off, leaving a fringe effect of about $1\frac{1}{2}$ inches in length.

It is claimed by the Government that this is an additional process not connected with the hemming or the finishing of the article, and hence carries the muffler beyond the condition described in paragraph 400 as not hemmed or hemmed only.

This court, as it contemplated the case in *Hensel, Bruckmann & Lorbacher v. United States*, *supra*, observed:

It is perhaps fair to conclude from the two samples that the silk threads tied in at the ends of the mufflers are a part of a proper hemming process thereof, as to us they seem likely to more effectually prevent the ends of the mufflers from unraveling than does the turning back and loosely sewing down the ends in one sample, or the treatment, whatever it may have been, that has been given to the ends of the other. The unraveling of either could hardly proceed further than these tied-in threads. If the overwhelming, whatever it is, is not hemming, then these are of course not hemmed, and a question might be made whether the tied-in silk threads were more than the mere finishing which the words "finished or unfinished" in the paragraph imply.

The testimony quite uniformly confirms this previously expressed theory of the court. It is to the effect that the introduction of the silk threads which form the fringed effect is necessary in order to complete and make effective and at all durable the finished end of the fabric. It is to the effect that without application of this process neither the overwhelming nor overlapping process would make a durable or satisfactory finish of the article. It was in that view that the court reversed the board in the case of *Hensel, Bruckmann & Lorbacher v. United States*, and which view, as stated, is confirmed by substantially all the testimony in this record. It is clearly shown herein that the threads are in all cases introduced to perfect and hold in place the overwhelmed and overlapped edges and are necessary thereto as well as for ornamentation. An examination and test of the samples confirms this view. Being necessary to complete the hemming process or its equivalent this can not be said to be a process beyond hemming either as a process or status of manufacture.

Indeed, it may be seriously doubted whether or not this effect produced by the silk threads upon the ends of the articles is a fringe within the language of these provisions of the tariff law. It will be

noted that paragraph 402 enumerates, as materials or articles specifically named for dutiable purposes, "fringes," and in the proviso thereto, which is relied upon by the Government, speaks of "articles composed wholly or in chief value of any of the *materials* or *goods* dutiable under this paragraph." Obviously, what Congress has in mind here is a separate, complete, and distinct made-up article or material of merchandise, to wit, a "fringe," bearing that name as designated in the law and which in its uses may be *per se* and as a fringe applied to or in the construction of another article as an individual part or material thereof. In this case we have no such material as or known as a "fringe" applied to or which enters as a material or article into the manufacture of the imported article. On the contrary, as it comes to union with this fabric it is a silk thread or collection of silk "threads" so known and otherwise named in the tariff law tied into the fabric to more effectually prevent the ends thereof unraveling, as well as, of course, for the incidental ornamental effect. The same view disposes of the contention of the Government that these are "trimmings" or "ornaments" within said paragraph 402, and that being so introduced into the fabric brings it within the provisions of the paragraph and its proviso.

We are of the opinion that the decisions of the Board of General Appraisers should be, and they are, *affirmed*.

SMITH, Judge, did not participate in the hearing or decision of these cases.

CHEE CHONG & Co. *et al.* v. UNITED STATES (No. 1471).¹

SALT FISH IN TINS.

The merchandise is fish, salted, and is at the same time fish in tin packages, and it was covered by both paragraphs 270 and 273, tariff act of 1909. As to which of these apply the more specifically seems to have been determined by judicial interpretation, an interpretation that appears to have received legislative approval. Salt fish in tins was not subject to the duty imposed by paragraph 273 of that act, but was classifiable as "other fish (except shellfish) in tin packages" under paragraph 270.

United States Court of Customs Appeals, March 3, 1915.

APPEAL from Board of United States General Appraisers, Abstract 36300 (T. D. 34727) and G. A. 7602 (T. D. 34788).

[Affirmed.]

Jules Chopak, jr., for appellants.

Bert Hanson, Assistant Attorney General (*Thomas J. Doherty*, special attorney, on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

SMITH, Judge, delivered the opinion of the court:

Fish fried in lard and packed in tins with salt was classified by the collector of customs at the port of San Francisco as "other

¹ Reported in T. D. 35194 (28 Treas. Dec., 348).

fish in tins" and was assessed for duty at 30 per cent ad valorem under the provisions of paragraph 270 of the tariff act of 1909, which paragraph reads as follows:

270. Fish (except shellfish) by whatever name known, packed in oil, in bottles, jars, kegs, tin boxes, or cans, shall be dutiable as follows: When in packages containing seven and one-half cubic inches or less, one and one-half cents per bottle, jar, keg, box, or can; containing more than seven and one-half and not more than twenty-one cubic inches, two and one-half cents per bottle, jar, keg, box, or can; containing more than twenty-one and not more than thirty-three cubic inches, five cents per bottle, jar, keg, box, or can; containing more than thirty-three and not more than seventy cubic inches, ten cents per bottle, jar, keg, box, or can; all other fish (except shellfish) in tin packages, thirty per centum ad valorem; fish in packages containing less than one-half barrel, and not specially provided for in this section, thirty per centum ad valorem; caviar, and other preserved roe of fish, thirty per centum ad valorem.

The importers claimed by their protest duly filed that the importation was dutiable at one-half of 1 cent per pound under paragraph 272, or at three-fourths of 1 cent per pound, or 1 cent per pound, or $1\frac{1}{4}$ cents per pound under the provisions of paragraph 273 of said act.

The paragraphs upon which the importers relied in their protest were as follows:

272. Herrings, pickled or salted, smoked or kippered, one-half of one cent per pound; herrings, fresh, one-fourth of one cent per pound; eels and smelts, fresh or frozen, three-fourths of one cent per pound.

273. Fish, fresh, smoked, dried, salted, pickled, frozen, packed in ice or otherwise prepared for preservation, not specially provided for in this section, three-fourths of one cent per pound; fish, skinned or boned, one and one-fourth cents per pound; mackerel, halibut, or salmon, fresh, pickled, or salted, one cent per pound.

The Board of General Appraisers overruled the protest and the importers appealed.

At the hearing before the board no evidence was introduced in support of the claim that the fish were herrings dutiable under paragraph 272, and consequently that ground of objection to the collector's assessment must be disregarded as without merit.

The testimony submitted by the importers was to the effect that the merchandise imported was fish which had been fried in lard, salted, and packed in tins *with salt*. This evidence was uncontradicted and brings the goods within the operation of paragraph 273, unless the provision of paragraph 270 for "all other fish (except shellfish) in tin packages" is applicable to the importation.

The importers contend, first, that paragraph 270 is limited in its operation to fish packed in oil and that therefore the fish in controversy, which is not put up in oil, can not be subjected to the duty thereby imposed; second, that as salted fish is imported in tin packages only, such fish should be excluded from classification as fish in tin packages under paragraph 270, in order to give some effect to that part of paragraph 273 which provides for fish salted; third, that

if the merchandise be within the description of both paragraphs, it is more specifically provided for as fish salted than as fish in tin packages, and is therefore dutiable under paragraph 273 rather than under paragraph 270 as held by the board.

None of the contentions is very convincing, and it does not appear to us that any of them offers any real reason for questioning the correctness of the decision reached by the board.

We think that paragraph 270 provides, first, for fish (except shellfish) packed in oil in certain classes and sizes of containers; second, for all other fish (except shellfish) in tin packages, whether packed in oil or not; third, for fish in packages containing less than one-half barrel, and not specially provided for, and whether packed in oil or not; and, fourth, for caviar and other preserved roe of fish, whether packed in oil or not. See *In re Chesebro* (T. D. 26646), *United States v. American Express Co.* (2 Ct. Cust. Appls., 95-99; T. D. 31636).

The restrictive words "packed in oil" in the first clause of paragraph 270 apply to all fish by whatever name known (except shellfish) packed in certain sizes of bottles, jars, kegs, tin boxes, and cans. The several sizes subject to the qualifying phrase "packed in oil" are specifically enumerated, and when the enumeration ends the qualification ends with it. There is nothing in the language of any of the clauses following the enumeration which affords the slightest evidence of a legislative intent to confine them to fish in oil, and from that it results that fish salted is within the language of the provision for "all other fish (except shellfish) in tin packages," and is not exclusively provided for by paragraph 273.

We have carefully examined the record and find no evidence whatever showing or tending to show that fish salted or prepared for preservation can be imported in tin packages only. The importers' second contention seems to be based, therefore, on a mere assumption, and, as it is wholly unsupported by the evidence in the case, we must decline to give it further consideration.

The merchandise in controversy is fish salted and is at the same time fish in tin packages. Consequently, the importation is covered not only by the tariff description of paragraph 273, but also by paragraph 270, and were either paragraph omitted the goods might very properly be classified for duty under the other. Both paragraphs, however, are in full force and effect, and as they carry different rates of duty but one of them can be applied to the merchandise. Which of the two should be applied depends on which of the two more specifically describes the goods, and that issue seems to have been settled, in principle, in favor of paragraph 270, by a judicial interpretation of similar provisions, which interpretation appears to have received legislative approval. Paragraph 258 of the tariff act of 1897 laid a duty of 30 per cent ad valorem on "all other fish (except shellfish) in

tin packages" and on "fish in packages containing less than one-half barrel, and not specially provided for." Paragraph 261 of the tariff act of 1897 imposed a duty of three-fourths of 1 cent per pound on "fish, fresh, smoked, dried, salted, pickled, frozen, packed in ice, or otherwise prepared for preservation." While those provisions were in force, fresh frozen smelt, packed in boxes containing less than half a barrel and imported into the country were assessed for duty at 30 per cent ad valorem as fish in packages containing less than one-half barrel and not specially provided for.

The importers claimed that the goods were fresh fish frozen, dutiable at three-fourths of 1 cent per pound. The Circuit Court of Appeals for the First Circuit held that the construction contended for by the importers would make paragraph 261 so sweeping that nothing would be left to which that part of paragraph 258, providing for fish in packages containing less than one-half barrel might be applied. The court, therefore, excluded the fresh frozen smelt from the operation of paragraph 261 and held, in effect, that paragraph 261 was less specific than the provision under which the goods had been assessed for duty. *Loggie v. United States* (137 Fed., 813).

The clause of paragraph 258 under which the smelt were assessed for duty, and the clause of paragraph 261 under which the goods were claimed to be dutiable by the importers, were reenacted in paragraphs 270 and 273 of the tariff act of 1909, and their reenactment, we think, must be regarded as an approval by Congress of the interpretation put upon them by the Circuit Court of Appeals in the *Loggie* case.

If the provision for fish, fresh, smoked, dried, salted, pickled, frozen, packed in ice or otherwise prepared for preservation, not specially provided for, was less specific than the provision for "fish in packages, containing less than one-half barrel, and not specially provided for," certainly it must be held to be less specific than the provision for "all other fish (except shellfish) in tin packages," which provision, by the way, does not contain the limitation incorporated in the clause for fish in half barrels.

The claim of importers' counsel that the principle laid down in *Loggie v. United States* has been overruled by this court is not sustained by the cases to which he calls attention. Those cases involved not the question of whether the provision for fish, fresh, smoked, dried, salted, pickled, etc., was more specific than the provision for fish in tin packages, but the question of whether certain clauses of the tariff law designating by name a particular kind of fish should not prevail over a provision which, in general terms, related to fish in tin packages. A reading of the cases cited shows very clearly not only that the question there disposed of was distinctly different from that raised by the pending appeal, but also that the principle laid

down in the Loggie case was neither expressly nor impliedly overruled by this court.

It seems to us that fish in tins must of necessity be in one or other of the conditions specified in paragraph 273. Should that paragraph, therefore, be accepted as the more specific, the clause of paragraph 270 which provides for fish in tins would become mere surplusage, inasmuch as there would be nothing left upon which that particular part of the paragraph might operate. We can not think that Congress intended any such result as that, and as the competing provisions are open to a reasonable construction which will give effect to both, and not nullify either, we are of opinion that in accordance with well-settled rules of interpretation that construction should be adopted.

We therefore hold that salt fish in tins is not subject to the duty imposed by paragraph 273, but should be classified as "other fish (except shellfish) in tin packages" under paragraph 270.

The decision of the Board of General Appraisers is *affirmed*.

MEMORANDUM OF DECISIONS.

(T. D. 34171.)

SUITS DISMISSED.

OCTOBER 20, 1913.

Jewelry.—United States v. Wiener Bros. *et al.* (1214); United States v. Lisner & Co. *et al.* (1230).

OCTOBER 24, 1913.

Jewelry.—United States v. Richards & Co. *et al.* (1250); United States v. Stern (1251); United States v. Musica & Son (1252); United States v. Wm. A. Brown & Co. (1253).

OCTOBER 31, 1913.

Printed matter on coated paper.—Gernet v. United States (1204); Gerret *et al.* v. United States (1210).

Goddard's Plate Powder.—United States v. Kraemer & Co. *et al.* (1173).

NOVEMBER 4, 1913.

Goddard's Plate Powder.—United States v. Acker, Merrill & Condit Co. (1192).

NOVEMBER 15, 1913.

Twill lappings.—United States v. Bredt & Co. (996).

Immortelles.—Rice & Co. v. United States (1155).

Wood flour.—Farr & Bailey Manufacturing Co. v. United States (1183).

Fish, skinned and boned.—United States v. Meyer & Lange (1198).

Fish in tins.—United States v. Strohmeyer & Arpe Co. *et al.* (1205).

NOVEMBER 28, 1913.

Immortelles.—Bayersdorfer & Co. v. United States (1184).

Wood flour.—Larzelere v. United States (1190); Innis, Speider & Co. v. United States (1191).

DECEMBER 9, 1913.

Printed bottles.—Utard v. United States (1236).

DECEMBER 29, 1913.

Clerical error.—United States v. Saunders (1279); United States v. Salt's Textile Manufacturing Co. (1289).

JANUARY 19, 1914.

Pumice stone.—Waddell & Co. v. United States (1296).

JANUARY 23, 1914.

Shrinkage charges.—United States v. Milbank (1316).

REVERSED.

OCTOBER 21, 1913.

Lace pins.—United States v. Calhoun, Robbins & Co. (1175).

NOVEMBER 19, 1913.

Seger cones.—United States v. Perry, Ryer & Co. (1227).

NOVEMBER 29, 1913.

Parts of musical instruments.—United States v. Tonk Bros. Co. *et al.* (1105); United States v. Sears, Roebuck & Co. (1104).*Waste rubber.*—Stern v. United States (1188).*Candles.*—United States v. Woolworth & Co. (1221).

DECEMBER 5, 1913.

Candles—Tapers.—Stern Bros. *et al.* v. United States (1219).

DECEMBER 9, 1913.

Shortage—Nonimportation.—United States v. Diggles (1223).

DECEMBER 11, 1913.

Scrap rubber.—Hempstead v. United States (1141); Eyttinge & Co. v. United States (1160).

DECEMBER 17, 1913.

Rotten fruit—Evidence.—Maniscalco v. United States (1228).

DECEMBER 22, 1913.

Grease.—United States v. Marden (1116); *Ibid.* (1140).

DECEMBER 24, 1913.

Imitation horsehair on wooden spools.—United States v. Rich Co. (1008).

REMANDED.

JANUARY 2, 1914.

Celery seed.—Stickney v. United States (1022).

REHEARING DENIED.

JANUARY 29, 1914.

Oak logs.—United States v. MacNaughton (1237).

(T. D. 34556.)**SUITS DISMISSED.**

NOVEMBER 28, 1913.

Scrap iron from Cuba.—Vandegrift v. United States (1256).

FEBRUARY 5, 1914.

Glass slabs.—Bache & Co. v. United States (1270).

FEBRUARY 11, 1914.

Ornamental leaves.—Bayersdorfer & Co. v. United States (1235); Reed & Keller v. United States (1238).

FEBRUARY 18, 1914.

Reliquidation.—United States v. Straus & Son (1033).*Artificial flowers.*—United States v. Importing & Manufacturing Co. (947); United States v. Carson (945).

MARCH 13, 1914.

Fish.—United States v. Marks & Co. (1199).

MARCH 20, 1914.

Ornamental leaves, except as to aigrette stipa grass.—Rice & Co. v. United States (1193).

MARCH 30, 1914.

Pumice stone.—Waddell v. United States (1218).

APRIL 1, 1914.

Tam O'Shanter stones.—Waddell v. United States (1283).

MAY 7, 1914.

Reappraisal—Samples.—Kenworthy's Sons v. United States (1312); Oelrichs v. United States (1311).

MAY 12, 1914.

Fish in tins.—United States v. Bush & Co. (1304); United States v. Barham (1305); United States v. Shallus (1306); United States v. Masson (1307); United States v. Moos & Co. (1325).

JUNE 1, 1914.

Lever lace trimmed cotton underwear.—Hirshbach & Smith v. United States (1318).

REVERSED.

NOVEMBER 15, 1913.

Segar cones.—United States v. Hensel (1226); United States v. Eimer (1267).

NOVEMBER 22, 1913.

Cloth balls.—Kraemer v. United States (1268).

FEBRUARY 17, 1914.

Straw trimming.—United States v. Theodore Ascher Co. (1291).

FEBRUARY 18, 1914.

Artificial flowers.—Downing, Judae & Co. v. United States (305, 947); Gage Bros. v. United States (304).

FEBRUARY 28, 1914.

Amor's metal polish.—Rosenheim v. United States (1288).

MARCH 24, 1914.

Metal polish.—Neustadter & Bros. v. United States (1349).

APRIL 2, 1914.

Wood pulp.—Germania Importing Co. v. United States (913); Hawley & Letzerich v. United States (1163).

APRIL 3, 1914.

Wood pulp.—Page, Newell & Co. v. United States (1151).

MAY 15, 1914.

Lava stone.—Downing & Co. v. United States (1389).

REHEARING.

FEBRUARY 5, 1914.

Shortage.—United States v. Bush & Co. (1164). Denied.

FEBRUARY 10, 1914.

Fraudulent entry.—United States v. Spingarn Bros. (1072). Denied.

FEBRUARY 27, 1914.

Clerical error.—Hampton, jr., & Co. v. United States (1186). Denied.

MARCH 25, 1914.

Gauge of beer.—United States v. Neustadt (1266). Granted.

MAY 28, 1914.

Bagging.—Hawley & Letzerich v. United States (1224). Granted.

Tam O'Shanter stones.—Waddell & Co. v. United States (1245). Denied.

REMANDED.

SEPTEMBER 30, 1913.

White pigment.—Innis v. United States (1154).

FEBRUARY 17, 1914.

Reliquidation.—United States v. Vitelli & Son (1084).

MODIFIED.

MARCH 16, 1914.

Lambskins.—Vandiver v. United States (1240).

REARGUMENT ORDERED.

MAY 28, 1914.

Inspectors' fees.—Atlantic Transport Co. v. United States (1337).

(T. D. 35021.)

SUITS DISMISSED.

SEPTEMBER 29, 1914.

Scientific apparatus.—United States v. Dingelstedt & Co. (1263).*Clerical error.*—United States v. Hudson Trading Co. (1290).

NOVEMBER 30, 1914.

Jewelry.—Altman & Co. v. United States (1430).

DECEMBER 15, 1914.

Shrinkage.—United States v. Haynes & Co. (1350).

DECEMBER 16, 1914.

Shrinkage.—United States v. Milbank, Leaman & Co. (1326).

DECEMBER 22, 1914.

Fancy electric-light bulbs.—United States v. Hensel (1400).*Cork waste.*—United States v. Nairn Linoleum Co. (1441).

REVERSED.

SEPTEMBER, 29 1914.

Opium, crude or dried.—Merck & Co. v. United States (1362).*Fish in tins.*—Bright Brokerage Co. v. United States (1386). Reversed in part, affirmed in part.*Bicycle handle-bar grips.*—Mead Cycle Co. v. United States (1398).

OCTOBER 21, 1914.

Fitted leather cases.—Bischoff & Co. et al. v. United States (1282). Reversed in part, affirmed in part.

NOVEMBER 25, 1914.

Stem glassware.—United States v. Burley & Tirrell Co. (1363).

NOVEMBER 27, 1914.

Compasses—Watch charms.—Sussfeld, Lorsch & Co. v. United States (1435).

DECEMBER 8, 1914.

Jewelry.—United States v. Strawbridge & Clothier (1422) (1423).

AFFIRMED.

OCTOBER 8, 1914.

Embroidery machines.—Ahlstrom & Co. et al. v. United States (1443).

OCTOBER 13, 1914.

Jewelry.—Gertzen & Co. v. United States (1439).

NOVEMBER 24, 1914.

Five per cent discount.—Lorsch & Co. *et al.* v. United States (1440). **Protests** 728676/35109 and 734435/4567.

NOVEMBER 30, 1914.

Canadian wood pulp.—Graham Paper Co. v. United States (1385).

DECEMBER 21, 1914.

Catalogues.—Sternberg v. United States (1388).

REHEARING DENIED.

NOVEMBER 18, 1914.

Reappraisement.—United States v. Scanlan (1309).

Canadian wood pulp.—United States v. Spanish River Pulp Paper Mills Co. (1260).

NOVEMBER 27, 1914.

Coronation cord.—Ullman & Co. v. United States (1342).

INDEX TO VOLUMES I, II, III, IV, AND V.¹

| | Volume and page. | | Volume and page. |
|--|--------------------------------|---|--------------------------------|
| Abandonment: | | Allowance—Continued. | |
| Duty may be abated without..... | III, 168 | None if packages opened in absence of customs officers..... | II, 189 |
| Goods lost overboard after arrival..... | IV, 51 | — (See also Loss; Nonimportation; Short- age.) | |
| Goods must be deliverable..... | IV, 51 | Almonds, "clear," what are..... | II, 399, 444, 450 |
| Goods totally destroyed..... | II, 332, 336 | Aluminum circles and blanks cut from sheets not as sheets..... | IV, 245; V, 514 |
| (See also Nonimportation.) | | American— | |
| Abrasives, function not to produce friction or heat..... | V, 489 | Citizens, foreign residents defined..... | IV, 414; V, 341 |
| Act July 26, 1911..... | IV, 146, 186; V, 519, 235, 366 | Fisheries— | |
| Action to recover duties, no constitutional right of..... | V, 151 | Change in statute relating to..... | V, 130 |
| Additional duty: goods in excess..... | II, 278 | Definition of..... | I, 515 |
| Adeps lanæ as refined wool grease..... | III, 316 | In Canadian waters of Great Lakes..... | V, 130 |
| Advanced in condition: | | Goods returned— | |
| Mixture with other materials..... | I, 400 | Animals not free as (1909)..... | II, 22, 288 |
| Shells cut and bored as..... | III, 504 | Articles partly of foreign origin..... | V, 364 |
| Structural shapes pressed after roll- ing..... | V, 175 | Effect of noncompliance with regu- lations..... | I, 220, 320; II, 537; III, 394 |
| Structural shapes with holes punched or drilled..... | V, 474 | Hides from American cattle not free as..... | I, 336; III, 1 |
| Advertising matter; books for gratuitous circulation..... | III, 528; IV, 458; V, 443, 523 | In the form of scrap..... | III, 394 |
| Agate beads and agate button blanks..... | V, 459 | Locomotive wheels repaired abroad..... | V, 364 |
| Algrettes made of grass, paper, and wire... V, 85 | | Scrap iron from Cuba; identity not proved..... | IV, 500 |
| Alabaster pedestals not sculptures..... | II, 508 | Manufactures, bags made in United States from foreign material..... | V, 366 |
| Alcohol in wine, determination of percent- age..... | III, 177 | Shooks; boxes and barrels made of, are free..... | IV, 91 |
| Alcoholic— | | Views, post cards showing..... | III, 501 |
| Compound, so-called fruit essence as... III, 375 | | Animals: | |
| Medicinal preparation, evidence.. I, 146; III, 10 | | American, dutiable on return..... | II, 22, 288 |
| Soap not an alcoholic compound..... | III, 358 | Live, snails not dutiable as..... | V, 134 |
| Ale in casks; allowance for wantage, leak- age, etc..... | III, 291 | Restricted meaning of tariff provision for..... | V, 134 |
| Alizarin assistant, paratine oil as..... | IV, 452 | Anthracin, meaning of "derived from an- thracin"..... | IV, 113 |
| Allowance: | | Antimony coated thinly with gold as plated | V, 506 |
| For damage not confined to perishable articles..... | III, 164 | Antiquities: | |
| For dirt adhering to cattle hides..... | I, 316 | Affidavits filed with entry do not make prima facie case for free entry..... | III, 142 |
| For dirt in oil seeds..... | II, 338 | Carving on of modern origin, not free.. III, 146 | |
| For leakage of ale in casks..... | III, 291 | Evidence held insufficient..... | IV, 474 |
| For leakage of sake (1897)..... | II, 305 | Furniture held free as..... | III, 152 |
| For wantage of ale in casks; lees not al- lowed as..... | II, 291 | Imported as baggage, subject to regula- tions..... | III, 384 |
| For wantage of beer in barrels..... | IV, 406 | In bond, compliance with regulations.. III, 187 | |
| None for dirt or impurities in raisins... IV, 228 | | Jurisdiction of board and Secretary.... III, 309 | |
| None for dregs and lees in ale..... | II, 291 | Regulations as to, can not be waived.. IV, 60 | |
| None for impurities unless in excess of normal..... | II, 338; IV, 228 | Apparatus, scientific, tank containing acid free as..... | II, 440 |
| None for leakage of sake..... | II, 371; V, 582 | | |
| None for leakage of wine..... | II, 340 | | |
| None for liquid in canned fish..... | IV, 401 | | |
| None for liquid in canned vegetables... V, 167 | | | |

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- Appeals:**
- And writs of error distinguished..... IV, 422
 - Board may reverse collector without taking evidence..... I, 323
 - Dismissed because of laches, irrespective of merits..... IV, 231
 - From General Appraisers—
 - Amendment of record on..... III, 174
 - Assignments of error held insufficient..... III, 251; IV, 291
 - Customs Court will not take further evidence..... I, 208
 - Government has right to prescribe conditions of..... I, 181; III, 24
 - No lower rate can be adjudged in absence of..... IV, 284
 - Petitions for review, form and matter of IV, 422
 - Practice on, California circuit..... III, 119
 - Questions not appealed will not be decided..... III, 112
 - Questions not considered on, unless assigned as error..... IV, 420
 - Reappraisment records when part of record..... I, 203
 - To Customs Court from Circuit Court.. I, 280
 - To Customs Court, time limit for..... I, 8
 - To Customs Court, time runs from date of action on motion for rehearing..... II, 434
 - To reappraisment by collector, how perfected..... V, 510
 - When record on may not be questioned. I, 213
- Apples, definition of a bushel..... III, 19**
- Appliqué:**
- Articles, screens as..... II, 181
 - Collarettes defined..... I, 168
 - Definition and scope of term..... V, 317
 - Dresses on which fancy ribbons are sewn, are not..... V, 317
 - Requires that figures and designs be cut out and applied..... V, 317
 - Silk fabrics, minimum rate..... I, 297
- Appraised value, cost of coverings as part of..... IV, 54; V, 2**
- Appraisement:**
- Affected by collector's right of reliquidation..... III, 256
 - Based on American selling price, legal.. I, 484
 - Can not be changed after reported to collector..... II, 249
 - Examination of goods is mandatory... I, 385, 462; II, 149
 - Final in absence of reappraisment.... IV, 491
 - Illegality of, if duress shown..... I, 36, 478
 - Invalidated by collector's action..... I, 36, 478
 - Must be of goods in condition as imported..... I, 115
 - Packing charges not a matter of..... V, 2
 - Presumption of regularity..... II, 239
 - Statutes held mandatory... I, 385, 462; II, 355
 - Waiver of by importer..... III, 256
- Appraisers:**
- And collectors; functions distinguished. V, 2, 435
 - duties of; legislation and litigation reviewed..... V, 2
 - Duty is to appraise, not classify, merchandise..... V, 435
- Appraisers—Continued.**
- Duty is to ascertain value per unit of quantity..... V, 127
 - No jurisdiction over costs or charges... V, 2
 - No power to change appraisement..... II, 249
 - reports on protests made more than 30 days after filing of protests..... V, 435
 - Reports on protests, not evidence against Government..... V, 435
 - Appraising officers, examination of goods by. III, 447
 - Arrival of vessel, when date of immaterial. I, 107
 - Arsenic, ore composed of arsenic and antimony oxides is not..... V, 196
- Art:**
- Works of, compliance with regulations. I, 293
 - Work of, copy of marble vase may be.. II, 321; III, 296
- Articles:**
- And materials distinguished. I, 337; II, 92, 212, 361
 - Fabrics are..... V, 320
 - Glazing stones are articles of mineral substance..... II, 425
 - Goods in the piece are..... V, 246
 - Mass of metal shavings as..... II, 311
 - Mass of modeling clay not..... III, 220
 - Meaning and use of term in tariff; cases reviewed..... V, 246
 - Meaning of "made up into"..... IV, 304, 414
 - Must have definite form and dimensions II, 92
 - III, 220, 363; V, 100
 - Narrower term than "manufactures of"..... III, 220, 363
 - Of personal adornment, par. 448, 1909. III, 273, 276, 282, 286, 288 IV, 378
 - To be worn on apparel means complete articles..... V, 332
- Artificial:**
- Feathers, grass aigrettes..... V, 85
 - Flowers—
 - As manufactures of material..... V, 85
 - Celluloid boutonnières are..... II, 234
 - Not limited to millinery goods..... V, 124
 - Wreaths made of, not dutiable as.. I, 337; II, 437
- Fruits—**
- diminutive imitations in wax are not..... IV, 384
 - Electric-light bulbs are not..... V, 418
 - Must be same size as real fruit..... IV, 384
- Horsehair—**
- Articles; cases reviewed..... V, 229
 - Braids, as cotton braids by similitude..... III, 229
 - Braids not similar to pyroxylin..... V, 229
 - Coated cotton yarn as (1909)..... III, 75
 - Hats as cotton wearing apparel by similitude..... III, 57
- Leaves—**
- Artificial shamrocks as..... II, 325
 - Paper leaves as..... V, 124
 - Musk not a coal-tar product..... I, 166
 - Refining not necessary to constitute article refined..... IV, 134
 - Shamrocks as artificial leaves..... II, 325
 - Silk beaded articles (1909)..... III, 333, 339

- | | Volume
and page. | | Volume
and page. |
|--|---------------------|--|---|
| Artificial—Continued. | | Birch: | |
| Silk flock coated cotton cloth..... | II, 479 | Bark as a nonenumerated article..... | V, 95 |
| Silk gloves as gloves of vegetable fiber..... | I, 86 | Tar oil as leather dressing..... | I, 122 |
| Silk yarn as single..... | II, 395 | Biscuits surfaced with icing as "contain- ing" icing..... | V, 532 |
| Silk yarn, spools containing..... | IV, 349; V, 1 | Bisque articles not susceptible of decora- tion: | |
| Arts, progress of, judicial notice of dictio- naries and treatises..... | I, 34 | (1897)..... | I, 93 |
| Asbestos fabrics, completed articles duti- able as..... | V, 327 | (1909)..... | II, 368 |
| Asphalt combined with other substances as asphalt advanced..... | I, 400 | Blanket protests held insufficient..... | I, 79 |
| Athletic club as an educational institution..... | V, 251 | Bleacher's blue held not to be a color..... | I, 104 |
| Automatic lighters, when and when not smokers' articles..... | II, 439; IV, 36 | Blue: | |
| Automobilist's tool outfit not a traveling set..... | III, 501 | Bleacher's, not a color..... | I, 104 |
| Baggage. (See Personal effects; Forfeit- ure.) | | Ultramarine, gray blue is not..... | I, 19 |
| Balata belting as india-rubber belting..... | I, 252 | Board of General Appraisers: | |
| Bamboo baskets as manufactures of chip..... | I, 535 | A judicial tribunal..... | V, 144, 315 |
| Bands and bandings, surgical bandages as..... | III, 112 | Affirmed when facts are in doubt..... | IV, 474 |
| Barium binoxide a chemical compound..... | I, 213 | Amending decision without holding rehearing..... | III, 174; IV, 217 |
| Bar-le-duc not classifiable as jelly..... | V, 371 | And Customs Court exercise jurisdic- tion over same class of cases..... | V, 373 |
| Baryta, precipitated carbonate of..... | I, 90 | Applying evidence taken in one case to other cases..... | I, 513, 527; II, 51; III, 77; IV, 266, 478; V, 198, 317, 319, 371, 401 |
| Basket bags are not baskets..... | IV, 516 | Case tried by one board decided by another..... | IV, 293; V, 270 |
| Baskets: | | Decision by, can not be attacked col- laterally..... | V, 144, 315 |
| Bamboo strip, as manufactures of chip..... | I, 535 | Decision by, final in absence of ap- peal..... | V, 144, 315 |
| Chip, as baskets of wood..... | II, 37 | Duties and powers defined..... | IV, 293 |
| Of wood may include baskets in chief value of silk..... | II, 411 | Failure of importer to appear at hear- ing..... | III, 440 |
| Silk bags with bamboo bottom not..... | IV, 516 | Finality of findings of fact..... | I, 513 |
| Willow, are baskets of wood..... | II, 15 | Findings of fact by General Appraisers who did not hear testimony..... | V, 93 |
| Wistaria and rattan, as manufacture of wood..... | I, 535 | Findings of fact by, reversed..... | V, 528 |
| Bast, definition and derivation of..... | V, 396 | Findings of fact, reviewable..... | I, 19, 263, 304; II, 270; III, 475; V, 423 |
| Bayonets as sidearms, not parts of rifles..... | II, 312 | Findings of fact, when conclusive..... | I, 279, 323; II, 105, 454; III, 209, 321; IV, 9 |
| Beaded artificial silk goods; duty on (1909)..... | III, 333, 339 | Has authority to issue commissions..... | I, 276 |
| Bead necklaces, clasps for, are parts of jew- elry..... | V, 470 | Hearing before, is a matter of right..... | V, 270 |
| Beads: | | Interlocutory rulings by, not appeal- able..... | V, 373 |
| Agate, held dutiable as button blanks..... | V, 459 | Jurisdiction— | |
| Articles composed of, beads perma- nently strung as..... | II, 314 | Acquired may not be transferred..... | V, 270 |
| Articles composed of, construction of proviso..... | III, 333, 339 | Cases on, reviewed..... | V, 373 |
| Articles held dutiable as..... | III, 509 | Extends only to charges on im- portations..... | V, 373 |
| Imitation pearl, not limitation precious stone..... | V, 93, 339 | How exercised..... | IV, 293 |
| Permanently strung as bead articles..... | II, 314 | In damaged goods cases..... | III, 198 |
| Beans. (See Vegetables.) | | Of protests, how and when ac- quired..... | V, 147, 435 |
| Beer: | | Parcel-post importations..... | IV, 297 |
| Branded capacity as basis of liquida- tion..... | V, 283 | Presumed if not directly attacked..... | V, 270 |
| Gauge of, evidence as to..... | IV, 406; V, 158 | 20-year-old works of art..... | III, 309 |
| Gauger's return not conclusive..... | V, 283 | May consolidate protests for hearing..... | III, 291 |
| Belting: | | May not use expert knowledge..... | V, 401 |
| Balata, as india rubber belting..... | I, 252 | May review collector's action without taking evidence..... | I, 323; IV, 49, 431 |
| Definition and scope of term..... | III, 91 | Misleading ruling cause of new trial..... | V, 319 |
| For machinery, a specific provision..... | IV, 394 | Must give parties opportunity to pro- duce testimony..... | V, 270 |
| For machinery, cotton rope as..... | III, 91 | Must observe its own rules of proce- dure..... | III, 251, 469 |
| For machinery, flax tape as..... | I, 142 | | |
| Not confined to power transmission..... | I, 537 | | |
| Bill of lading, through "direct shipment"..... | I, 450 | | |
| Bindings a more specific provision than trimmings..... | III, 470 | | |

| | Volume and page. | | Volume and page. |
|--|--------------------------------|--|--------------------------|
| Board of General Appraisers—Contd. | | Burden of proof. (<i>See Evidence.</i>) | |
| No power to reassign case after trial.... | V, 270 | "Bushel of apples," definition of..... | III, 19 |
| Not expected to exhibit expert knowl- edge..... | II, 456; III, 52, 408 | Button— | |
| Procedure on motions for rehearing.... | III, 251 | Blanks, agate beads used as, dutiable as. | V, 459 |
| Reviewed on questions of market value. | V, 204 | Material, dimensional requirement (1909)..... | III, 430 |
| Boats, racing shells are not "vessels".... | II, 526 | Buttons: | |
| Boleros are wearing apparel..... | I, 92 | Collar, ascertainment of line measure.. | IV, 217 |
| Bond: | | Dress, fancy vest buttons as..... | I, 542 |
| Given by importer to produce consular invoice..... | III, 256 | Glass, lined with fish scale, not buttons of glass..... | V, 327 |
| Goods in, are subject to change in regu- lations..... | III, 137 | Glass, rhinestone buttons not dutiable as..... | V, 304 |
| Bonded smelters, lead products made in.... | II, 231 | C of glass and glass buttons; distinctions. | V, 327 |
| Booklets, hand-decorated, may be other than paper..... | III, 341 | Paste, not classifiable as glass buttons.. | V, 304 |
| Books— | | Cabinet wood: | |
| Containing facsimiles of paintings, no text..... | V, 524 | Ash, oak, and poplar are not..... | IV, 449 |
| For gratuitous private circulation, ad- vertising matter.. | III, 528; IV, 458; V, 443, 523 | Characteristics and uses of..... | IV, 449 |
| Printed chiefly in foreign language, unbound sheets not..... | V, 524 | Sawed Spanish cedar is..... | IV, 480 |
| Borate materials are natural substances only..... | II, 212 | Cadmium sulphide as a color or pigment.... | II, 505 |
| Bottle caps, viscose caps for glass tubes are not..... | V, 423 | Canada: | |
| Bottles: | | Restrictions upon export of wood from..... | V, 235, 519 |
| Are not coverings..... | I, 477 | Wood pulp from; conditions of free entry..... | V, 235, 519 |
| As coverings..... | III, 130 | Canadian reciprocity act: | |
| Containing ad valorem merchandise (1909)..... | III, 245 | Effect on favored-nation clause in treaties..... | IV, 146, 186; V, 366 |
| Glass, provision for, restricted to those used as containers..... | IV, 26 | Pulp made in Canada from wood grown elsewhere..... | V, 366 |
| Glass, thermos bottle dutiable as blown glassware..... | IV, 26 | Capers, pickled..... | I, 171; II, 408; IV, 261 |
| Plain green or colored, wicker-covered bottles are not..... | IV, 406 | Caps, children's ear, not wearing apparel.. | I, 49 |
| Bouillon cubes not extract of meat..... | IV, 129 | Carbazol, dyed from, are not "derived from" anthracin..... | IV, 113 |
| Boutonnieres, celluloid, not toys..... | II, 234 | Carbon articles nonenumerated..... | IV, 5 |
| Box tops, lithographed paper, as litho- graph prints..... | I, 434 | Carbonate of baryta, precipitated..... | I, 90 |
| Boxes covered with surface-coated paper... | I, 120 | Cardboard— | |
| Braids: | | Includes all paper board..... | II, 225 |
| Artificial horsehair, as cotton braids by similitude..... | III, 229 | Millboard, and paper..... | I, 47; II, 51, 225 |
| Horsehair, as silk braids by similitude. | V, 104 | Carmelite ware as enameled earthenware.. | II, 85 |
| Breccia as marble..... | II, 70 | Caseln free as lactarene..... | II, 292 |
| Brick— | | Cast hollow ware: | |
| Does not include everything in the shape of a brick..... | V, 63 | Means kitchen utensils..... | II, 451 |
| Means building and similar brick..... | V, 63 | Scope of provision for..... | IV, 281 |
| Brine, percentage of salt necessary to con- stitute..... | IV, 98 | Cast iron— | |
| Bronze statuary as statuary wrought by hand..... | III, 168, 226 | Grinders not plates..... | I, 22, 29 |
| Brooms: | | Machine parts as castings..... | IV, 304; V, 362 |
| And brushes— | | Castings: | |
| Distinctions and similarities.... | IV, 330, 331 | Iron, fireplace linings not..... | II, 475 |
| Sticks with fringed ends not..... | IV, 330 | Iron, nickel plated, as manufactures of metal..... | V, 410 |
| Twigs tied in bundles are..... | IV, 331 | Iron, machine parts as..... | IV, 304; V, 364 |
| Building stone, suitability for building purposes..... | III, 72, 486; IV, 110 | C of iron means wholly of iron..... | V, 410 |
| Bungo sulphur, naturally pure, not dutiable as refined..... | IV, 134 | Catgut strings. (<i>See Gut strings.</i>) | |
| | | Cattle hair goods as wool goods..... | II, 339 |
| | | Caviar— | |
| | | Held free as fish eggs..... | I, 1 |
| | | Held not free as fish eggs..... | II, 95 |
| | | Celery seed as an aromatic seed..... | II, 353 |
| | | Celluloid, articles composed wholly of.... | I, 118 |
| | | Ceramic colors as enamel colors..... | I, 216; III, 387 |
| | | Chalk, French, all talc is not..... | III, 522 |
| | | Chamois skins with scalloped edges not manufactures of leather..... | V, 125 |

| | Volume and page. |
|---|------------------------|
| Change in law; goods in customs custody for examination..... | I, 189 |
| Charges— | |
| Are not a matter of appraisement..... | V, 2 |
| Assessable where entry is made with- out invoice..... | III, 450 |
| Coverings are not to be considered as..... | III, 130 |
| Drayage must not exceed usual rate.... | IV, 463; V, 307 |
| Shrinkage, on woolen goods, not dutia- ble..... | V, 432 |
| Charms, watch compasses are not..... | V, 382 |
| Charts, broadened meaning of term..... | IV, 42 |
| Chemical— | |
| Compounds— | |
| Adding solvent does not form..... | II, 292 |
| And chemical mixtures distin- guished..... | II, 245; IV, 336 |
| And mixtures are artificial prod- ucts..... | V, 196 |
| Distinctions noted..... | I, 213; II, 285 |
| Mixture largely of minerals..... | IV, 336, 433, 437 |
| Or mixtures, what are not..... | IV, 81, 336 |
| Mixture, definition of..... | I, 400 |
| Chemicals and minerals distinguished.. | IV, 433, 437 |
| Cherries: | |
| In maraschino, classification of.. | I, 239; III, 230 |
| Ripe, not dutiable as dried fruit..... | V, 89 |
| Chiffon— | |
| Bands or ribbons not articles of chiffon. | II, 515; |
| | III, 215 |
| Not woven fabrics of silk..... | II, 515 |
| China: | |
| And earthenware distinguished..... | II, 85 |
| Goat hair not dutiable as wool..... | V, 500 |
| Meaning of enameled..... | II, 85; III, 193; |
| What is printed china.... | III, 193; IV, 359, 403 |
| Chip baskets: | |
| Are baskets of wood..... | II, 37 |
| Bamboo strip baskets as..... | I, 535 |
| Christmas seals are not dutiable as labels.. | V, 385 |
| Chrome, hydroxide of, a crude substance.. | II, 165 |
| Chutneys as fruits preserved..... | I, 328 |
| Cigarette paper not used for cigarettes.... | I, 497 |
| Cinematograph films as photographs..... | I, 51 |
| Citizenship, free entry of personal effects... | I, 134 |
| Classification: | |
| Addition of a solvent not affecting..... | II, 292 |
| Any substantial use sufficient..... | IV, 301 |
| Chemical meaning held to govern..... | II, 465 |
| Class designation held to prevail over individual..... | IV, 378, 389 |
| Collector's, stands, unless importer af- firmatively proves claim..... | I, 360; II, 427 |
| Cotton gloves are gloves wholly of cot- ton..... | IV, 298 |
| Damage does not affect..... | V, 465, 472 |
| Dependent on use— | |
| Incomplete articles..... | IV, 438, 470 |
| Smokers' articles..... | I, 194 |
| Dependent upon conditions of importa- tion trade..... | I, 380 |

Classification—Continued.

| | Volume and page. |
|---|---|
| Dependent upon use made of particular importation..... | II, 532 |
| Determined by only useful component..... | V, 62 |
| Determined by quantity, not value of material..... | II, 419; III, 390; V, 327 |
| Does not depend on nature of package.... | I, 113 |
| Each importation determining..... | V, 519 |
| Effect of silk threads in selvage of cotton cloth..... | I, 223 |
| Entireties may be separated for..... | V, 364 |
| Exclusiveness of use not necessary..... | IV, 301 |
| Goods indiscriminately mixed..... | I, 316, 353 |
| Governed by condition as imported, not process used..... | II, 65, 78, 162; V, 506, 527 |
| Highest rate rule invoked..... | V, 1 |
| Intent as an element in... I, 134, 404; II, 347, 532 | |
| "Made of," "of," "manufactured of," etc..... | V, 327 |
| Of goods determined by classification of machine made on..... | V, 534 |
| Pine cones containing nuts, separable for..... | V, 516 |
| Separation into constituents permitted.... | I, 472 |
| Specific designation controlling..... | II, 380, 479; IV, 471 |
| Specific designation when not control- ling..... | II, 321, 465, 526; III, 102, 488; IV, 132, 378, 422; V, 63 |
| Substantial part controlling..... | IV, 398 |
| Use as determining..... | II, 353, 439, 532; IV, 36, 47, 110, 301; V, 28, 489 |
| Use prevails over class designation..... | II, 512 |
| Use prevails over specific designation.... | I, 142 |
| Waste as material in raw state..... | II, 431 |
| Clerical error: | |
| Failure to note nondutiable charges..... | V, 286, 288 |
| Manifest, does not require oral evidence to show it..... | V, 44, 51 |
| Manifest, invoicing at wrong value not..... | IV, 491; V, 44, 51, 69, 99, 286, 288 |
| Must be plainly apparent from papers before appraiser and collector..... | IV, 223, 284, 491; V, 69, 99, 286, 288 |
| Rule applies as to additional duties only..... | V, 51, 163 |
| Clippers, hair, are not shears..... | II, 109 |
| Cloth in part of wool a specific provision.. | I, 223; III, 161, 236; IV, 226 |
| Coal— | |
| Slack mixed with bituminous coal may be separated for duty purposes..... | I, 353 |
| Tar colors, carbazol colors are..... | IV, 113 |
| Tar dyes, bases incapable of imparting color not..... | V, 226 |
| Tar products— | |
| Cresote oil, so called..... | IV, 268 |
| Dominant characteristics..... | I, 166 |
| Coat hangers, cotton tape in lengths held to be..... | V, 110 |
| Coated— | |
| Cotton cloth in chief value of artificial silk..... | II, 479 |
| Paper, oil-impregnated paper is not..... | IV, 11 |
| Coating metal equivalent to plating..... | V, 506 |

- | | Volume
and page. | | Volume
and page. |
|--|---------------------------|--|------------------------------|
| Coco fiber cut into lengths and bunched, not crude..... | V, 210 | Commercial designation—Continued. | |
| Coffee substitute: | | No presumption that it continues un- changed..... | V, 371 |
| Coffee coloring as..... | I, 106 | Not affected by customs practice..... | IV, 480 |
| Fig essence as..... | I, 106 | Not a matter of judicial cognizance..... | V, 371 |
| Collar supporters, silk-covered wire..... | III, 459 | Not established by single sale..... | V, 500 |
| Collars are wearing apparel..... | I, 92, 168 | One witness insufficient to prove..... | I, 527 |
| Collector: | | “Planing” as applied to lumber, held to be a..... | V, 541 |
| Appeal to reappraisal, by, time and method of taking..... | V, 510 | “Plated with gold or silver” not a..... | V, 506 |
| Can not waive compliance with regula- tions..... | IV, 60 | Pony skins as fur skins..... | II, 209 |
| Decision affirmed, though wrong. I, 360; II, 159 | | Prevails over descriptive phrase..... | II, 390 |
| Decision of, what is..... | I, 489 | Proof that article is known as ladder tape not sufficient to class it as tape... IV, 95 | |
| Jurisdiction over protests ceases 30 days after filing..... | V, 435 | Qualifications of witnesses..... | III, 378 |
| Must follow board decision or appeal from it..... | V, 144 | Requirements of proof..... I, 14, 255, 257, 500; II, 43, 457; III, 247, 378, 410, 420; V, 294 | |
| Must forward protests to board within 30 days..... | V, 435 | Review of cases on..... | III, 282, 410 |
| Sole jurisdiction over costs and charges. | V. 2 | Requiring explanatory adjective. IV, 95; V, 183 | |
| Colored— | | Rule applies to descriptive words..... | II, 247 |
| Glass articles, colored in the pot..... | II, 411 | Scouring bricks are not classifiable as brick..... | V, 63 |
| Means having color..... | II, 78, 411 | Subordinate designations immaterial... IV, 510 | |
| Colors— | | Subordinate to manifest legislative in- tent..... | II, 46 |
| And dyes, distinctions between..... | V, 226 | Technical terms may be proved..... | I, 346 |
| Cadmium sulphide used for coloring as. | II, 512 | Term requiring explanatory words..... | V, 183 |
| Containing lead more specific than lakes n. s. p. f. | I, 32 | When immaterial..... | II, 457 |
| China and glass, as not containing quicksilver but containing lead..... | I, 216 | Commercial— | |
| Effect of tariff subheadings..... | I, 104 | Practice affecting classification..... | II, 380 |
| Iron ore powdered and levigated as..... | III, 83 | Testimony preferred to scientific..... | II, 63 |
| Material used as filler as..... | III, 83 | Commission: | |
| Or pigments, cadmium sulphide..... | II, 512 | Charge for, on Bradford goods... I, 478; III, 83, 343; V, 447 | |
| Combs, gallilith, as similar to horn combs. | II, 203 | Paid to seller is part of market value... V, 447 | |
| Commercial designation: | | Commissions to take testimony, authority of General Appraisers..... | I, 276 |
| A fact to be proved in each case. III, 247; V, 371 | | Component material— | |
| Article with two names dutiable at higher rate..... | V, 459 | Of chief value, rule for ascertainment of. II, 143; 505; III, 211; V, 298, 401, 418 | |
| Change in meaning of, in course of time..... | II, 192; III, 91; IV, 510 | Predominating in quantity..... | II, 419; III, 390; V, 327 |
| Common designation may be proved in absence of..... | IV, 313 | Composed of, made of, manufactured of, manufactures of, in chief value of.. IV, 344; V, 327 | |
| Conflicting evidence..... | I, 255, 500; III, 247 | Compound: | |
| Denominative provision versus des- criptive..... | II, 459 | Addition of a solvent does not make a... II, 292 | |
| Drawplates are not plates..... | II, 4 | Duty— | |
| Evidence necessary to prove..... | III, 378 | Coverings of goods paying..... | III, 327 |
| Fire or furnace sand not free as sand... IV, 327 | | Reduced to ad valorem equivalent. III, 333, 339 | |
| In this country governs..... | III, 420 | Condiments not vegetables..... | I, 171; II, 342 |
| Invoice description as showing..... | III, 247 | Condition: | |
| Irrelevant as to articles made from wire..... | IV, 420 | As imported, appraisement must be of. I, 115; II, 215 | |
| Irrelevant as to cut mica..... | IV, 416 | Held not to govern..... | II, 227 |
| May be proved by trade catalogues.... IV, 313 | | Modification of rule..... | II, 162 |
| May be proved by usage other than in buying, selling, or ordering..... | V, 226 | Weight of sugar..... | II, 116 |
| Must be shown to exclude as well as include review of decisions.... I, 328; IV, 261 | | Cones, pine, containing nuts, dutiable weight of..... | V, 516 |
| Must coincide with tariff term... II, 347; IV, 95 | | Confectionery on surface of biscuit, is “con- tained” in it..... | V, 532 |
| Need not coincide with tariff term..... | II, 269 | Consignee is the owner for customs purposes. IV, 262 | |
| Negative testimony as to, effective.... III, 410 | | | |

| | Volume and page. |
|---|-------------------------------|
| Constitutional law, closing of customhouse. | I, 415 |
| Construction: | |
| Absurdity, language of statute may be altered to avoid. | II, 80 |
| Absurdity, to be avoided. | III, 117 |
| Action of Congress on proposed amendments as a guide to. | I, 472 |
| Adherence to uniformity in, desirable. | II, 427 |
| Articles "wholly of" are "in chief value of". | I, 118; III, 117 |
| Articles on both dutiable list and free list are dutiable. | II, 70 |
| Association of words "handkerchiefs or mufflers" does not restrict provision to mufflers that are of the character of handkerchiefs. | IV, 38, 486 |
| "By whatever name known". | V, 40, 256 |
| Canadian reciprocity act of 1911. | IV, 146, 186 |
| Change in language implying change of intent. | II, 70; |
| 123, 314, 317, 342, 350, 408, 411, 459, 471, 477; III, 112, 184, 230, 240, 316, 430; IV, 261 | |
| Change in language implying no change in intent. | II, 485, |
| 515; III, 168, 301; IV, 443 | |
| Common law as a guide to. | III, 19 |
| Commonly used, evidence to show. | I, 122 |
| Composed of included in chief value of. | IV, 344 |
| Context of statute as a guide to. | II, 526 |
| Debates in Congress as aid to. | III, 309 |
| Decision on merits of question conclusive even when claims in protests are different. | II, 192; III, 83 |
| De minimis rule held inapplicable. | V, 377 |
| Descriptive and denominative terms. | II, 247 |
| Descriptive phrase relates to immediate antecedent. | V, 85 |
| Dictionary definition rejected. | V, 357 |
| Double enumeration, highest rate rule. | I, 120; |
| II, 70 | |
| Double enumeration, no presumption that subsequent paragraph prevails over a preceding one because latest expression of legislative intent. | |
| Both paragraphs contemporaneous. | II, 15 |
| Doubt resolved in favor of importer. | V, 178 |
| Effect of omission of words used in earlier statute. | I, 216 |
| Effect to be given to every part of a statute. | I, 443, 545; II, 80 |
| Ejusdem generis rule, cases involving. | V, 63; |
| IV, 480; V, 95; I, 252; 465, 477; II, 112; | |
| I, 252; IV, 287; II, 181, 422; I, 374; II, 181 | |
| Entire statute should be read. | V, 178 |
| Enumeration, what constitutes an. | III, 57, 67, 89 |
| Equally specific provisions, highest rate rule applies. | V, 459 |
| Established practice— | |
| A master rule. | II, 317; III, 260, 265, 301 |
| As a guide to. | III, 479 |
| Can not legalize that which is illegal. | I, 312; III, 62 |
| Discussion of. | I, 171; II, 92, 399; III, 204 |
| Paintings and frames. | V, 222 |
| Rule inapplicable where statute is plain. | I, 237; II, 389; III, 204 |

Construction—Continued.

Established practice—Continued.

| | |
|---|----------------------------------|
| Rule meager record in controlling case. | III, 301; V, 357 |
| Rule prevails irrespective of correctness. | V, 357 |
| Exception clause is confined to what preceded it. | V, 56 |
| Exceptions must be strictly construed. | V, 178 |
| Expressed exception excludes every other possible exception. | II, 101; IV, 496 |
| Favored that gives effect to every part of statute. | V, 121 |
| Favored that gives effect to obvious intent of statute. | V, 273 |
| Favored that levies higher duty on advanced forms of manufacture. | I, 158, |
| 542; II, 399, 444, 450; V, 320 | |
| "Fit only for" refers to commercial fitness. | I, 122; IV, 47; V, 28 |
| General provision held to be more specific. | II, 237 |
| Grammatical rules as a guide to. | II, 9, |
| 26, 296; III, 117, 276 | |
| History of paragraph as a guide to. | I, 374, 457; |
| II, 95, 112, 172, 302; III, 204, 430; V, 273 | |
| History of times as a guide to. | II, 129, 342 |
| "Including" as a word of extension. | II, 172, |
| 342; IV, 105; V, 79 | |
| Inconsistent customs practice. | V, 534 |
| Intent of legislature justifies reform of provision. | II, 80 |
| Intent of legislature prevails over commercial meaning. | II, 46 |
| Language of statute may be altered to carry out intent. | II, 80; V, 273 |
| Legislative recognition of judicial construction. | I, 457, 556; |
| II, 70, 95, 112, 203, 301, 317, 368, 374, 515; III, | |
| 97, 220; IV, 105, 464; V, 178, 222, 304, 331, 357 | |
| Liberal favored in case of goods for college use. | II, 440 |
| Limitation of subject matter applies to whole paragraph. | V, 410 |
| "Made of" held not to be equivalent to "in chief value of". | IV, 252 |
| Meaning of words changing in course of time. | IV, 42 |
| Modifying clause following several antecedents. | II, 296; III, 117, 273, 276, 430 |
| More specific provision: | |
| Articles of porcelain than earthenware crucibles. | IV, 462 |
| Calfskins tanned and dressed than grain leather. | IV, 58 |
| Cloth in part of wool than manufactures in chief value of India rubber. | III, 161 |
| Colors containing lead than lakes, n. s. p. f. | I, 32 |
| Colors or pigments than chemical salts. | II, 512 |
| Essential oils than drugs advanced. | IV, 109 |
| Fish in half barrels than fish packed in ice. | V, 331 |
| Fish in tins than fish salted. | V, 556 |

| Construction—Continued. | Volume and page. |
|--|---|
| More specific provision—Continued. | |
| Fish packed in oil than herring, salted..... | V, 40 |
| Flexible metal tubing than copper pipe..... | II, 221 |
| Fruits in brine—pickles..... | II, 342 |
| Herrings pickled than fish in tins.. | II, 471 |
| Herrings pickled than fish in tins, skinned or boned..... | IV, 471 |
| In part of wool than in chief value of cotton..... | V, 261 |
| Smokers' articles than leather cases | I, 377 |
| Tamarinds than fruits in sugar..... | II, 380 |
| Waterproof cloth than velvet..... | V, 215 |
| Yellow earthenware with white glaze than enameled earthenware..... | V, 76 |
| Name of material used adjectively.... | IV, 252, 298, 430 |
| Negative provision, effect of..... | I, 309 |
| Not favored that imposes higher duty on inferior product..... | V, 183 |
| Not favored that imposes higher duty on material than on finished product. | V, 320 |
| Not necessary when statute plain..... | I, 152; III, 184; IV, 1, 242 |
| "Notes on Tariff Revision" as aid to.. | I, 152; II, 350, 399, 411, 459, 485, 515; III, 120, 168, 183, 276, 301, 321, 370, 475; IV, 11, 29; V, 95, 256, 273, 331 |
| Noun used as an adjective, effect of. | IV, 252, 430 |
| Of jewelry paragraph (1909)..... | III, 273, 288; IV, 378 |
| Of lithographic print paragraph (1909). | II, 422; III, 343; IV, 234 |
| Of proviso reducing duties on leather (1909)..... | II, 46, 129 |
| Of proviso to lace paragraph (1909).... | V, 170 |
| Of steel material paragraph (1897)..... | II, 1 |
| Of tea-covering paragraph (1913)..... | V, 453 |
| Of wire paragraph (1909)..... | III, 459; IV, 396 |
| Of zinc material paragraph (1909)..... | II, 137 |
| "Other paragraph" does not mean other provision in same paragraph..... | III, 276, 288 |
| "Other," varied uses of word..... | II, 95, III, 117 |
| Parenthetical clause in bottle paragraph | III, 245 |
| Platinum "in wire" means wholly of platinum..... | IV, 398 |
| Plural form includes singular..... | II, 425 |
| Plural may be read as singular and singular as plural..... | V, 264 |
| Policy of the law as a guide to.. | II, 399; III, 184 |
| Presumption that commercial meaning is same as ordinary meaning..... | III, 204 |
| Presumption that Congress recognizes change in meaning of words..... | IV, 42 |
| Presumption that legislature means what it says when language is plain.. | IV, 1 |
| Presumption that words mean the same in same statute..... | I, 556 |
| Prior decisions based on meager records..... | III, 301; V, 357 |
| Proceedings in Congress as an aid to.... | V, 453 |
| Provision for decorated implies susceptibility of decoration..... | I, 93; II, 368 |

| Construction—Continued. | Volume and page. |
|--|---|
| Provision for "filled or unfilled" does not exclude articles incapable of being filled..... | V, 56 |
| Provision for hemstitched, embroidered, etc., does not imply susceptibility of hemstitching, embroidering, etc.. | IV, 81, 496 |
| Provision for "unwrought" does not imply susceptibility of being wrought | I, 158 |
| Provision without limiting words includes all kinds and grades..... | V, 465 |
| Proviso as a rider on entire act..... | II, 519, 515; III, 215 |
| Proviso as an independent provision... | II, 125 |
| Proviso operates on preceding enactment..... | I, 120; II, 129; III, 356 |
| Proviso scope controlled by manifest intent..... | I, 309, 443; II, 46, 101, 125, 129 |
| Punctuation immaterial..... | V, 261 |
| Relative specificity does not depend on presence or absence of n. s. p. f. phrase. | IV, 58 |
| Rule disappears when reason for it disappears..... | II, 471 |
| Scope of paragraph not limited by heading..... | IV, 392 |
| Specific designation held not to control. | IV, 378 |
| Statutory distinctions considered.. | II, 11, 15, 70, 125, 526, 481; III, 265; IV, 5; V, 134, 178, 304, 331 |
| Statutory distinctions disregarded..... | III, 528; IV, 38, 486 |
| Strict, when required..... | II, 532; III, 430 |
| Subsequent statutes as a guide to..... | I, 158 |
| Tariff subheadings as a guide to.... | I, 104, 529; III, 341; IV, 392 |
| Terms that refer to final condition rather than process of manufacture. | V, 506, 527 |
| Terms used as words of specification rather than of extension..... | V, 541 |
| Terms used out of caution and not indicating distinctions..... | V, 506 |
| That gives Secretary arbitrary power not favored..... | III, 309 |
| That has effect of levying prohibitory duties..... | II, 65, 389 |
| That leads to an absurdity to be avoided..... | III, 117 |
| That requires performance of impossibility to be avoided..... | IV, 116 |
| That would cause confusion in kindred provisions to be avoided..... | II, 444 |
| Transposition of words and phrases permitted..... | IV, 234, 247, 253; V, 273 |
| Whatever is part of an article is "contained" in it..... | V, 532 |
| (See also Classification; Commercial designation; Words and phrases.) | |
| Consular— | |
| And pro forma invoices— | |
| Differing values..... | II, 239, 249; III, 256; IV, 491 |
| Review of cases..... | II, 249 |
| Samples, appraisement on, illegal..... | I, 462 |
| Containers— | |
| Cylindrical or tubular tanks or vessels must be..... | IV, 132 |

| | Volume and page. | | Volume and page. |
|---|---------------------|---|--|
| Containers—Continued. | | Countervailing duty. (<i>See</i> Petroleum; Sugar.) | |
| Frames of pictures are not..... | V, 222 | Country: | |
| Laquered metal boxes must be..... | IV, 242 | Meaning of, in revenue laws..... | I, 443 |
| Copper— | | Of production, pulp made in Germany from wood grown in Russia..... | V, 366 |
| Matte and regulus of copper held syn- onymous..... | V, 398 | Courts: | |
| Matte derivation and description..... | V, 398 | Customs Appeals— | |
| Pipes, flexible tubing not..... | II, 221 | And Board of General Appraisers exercise jurisdiction over same class of cases..... | V, 373 |
| Coquille glasses, bent glass disks are not..... | IV, 21 | Assessed rate stands unless party appeals..... | IV, 284 |
| Cord defined as requiring twisted strands.. | IV, 77; V, 357 | Jurisdiction extends only to charges on importations..... | V, 373 |
| Cork— | | May decide defaulted cases on merits..... | III, 440 |
| And corks; legislation and litigation re- viewed..... | V, 404 | May fix other rate than that either assessed or claimed..... | III, 375 |
| Bark and cork wood distinguished.... | V, 404 | Power to judge competency of evi- dence taken by board..... | III, 10 |
| Clippings from manufacture of corks as cork wood unmanufactured..... | V, 404 | Power to remand to General Ap- praisers for taking of further tes- timony..... | I, 208; II, 483; III, 10, 495 |
| Floats not parts of fishing tackle..... | I, 529 | Power to review questions of fact. I, 19, 263; II, 275; III, 10 | |
| Waste free as cork wood unmanufac- tured..... | V, 404 | Power to review reappraisements.. | III, 330 |
| Corkine floor covering as linoleum by simi- litude..... | II, 505 | Rehearing denied by..... | I, 320 |
| Coronation cord as cord..... | IV, 77; V, 357 | Will not grant new trial because of failure of proof..... | II, 483 |
| Corporations as "individuals"..... | III, 528 | Will not pass on question not raised by appeal..... | III, 180 |
| Corundum ground, dutiable by similitude as emery..... | I, 506 | Will not review action of board in denying rehearing..... | II, 436, 462 |
| Costs, charges and expenses. <i>See</i> "Charges". | | Coverings: | |
| Cotton— | | Ad valorem goods..... | II, 61 |
| And cotton waste distinguished..... | I, 246 | Beams and spools containing yarn.. | III, 62; IV, 349, 355; V, 1, 47 |
| Articles and cotton cloth distinguished.. | III, 191 | Cans containing vegetables..... | II, 30 |
| Bagging for..... | III, 495 | Containers for liquids not dutiable as.. | I, 465, 477 |
| Bands for bandages not cotton cloth.... | III, 112 | Containers of liquids not regarded as.... | III, 130 |
| Cloth— | | Display cases for harmonicas..... | IV, 122 |
| Coated, a specific provision..... | II, 479 | Drums as cylindrical vessels..... | I, 152; II, 57; III, 94, 234 |
| Definition in act of 1909..... | III, 112, 191 | For liquids not part of dutiable value... I, 465, 477; III, 130 | |
| Figured— | | Laquered tin boxes containing paints.. | II, 299 |
| Average count of threads deter- mines count..... | III, 240 | Of ad valorem goods..... | II, 61 |
| Basis of value is whole fabric..... | II, 215 | Of compound duty goods..... | III, 327 |
| Method of counting threads..... | III, 240 | Of specific duty goods..... | I, 309; III, 62; IV, 349, 355; V, 1 |
| What are ordinary threads..... | I, 73 | Pipe cases are not, but smokers' articles | I, 101 |
| Filled, not painted cotton cloth..... | I, 556 | Specifically provided for in tariff act.... | II, 299 |
| In the piece, as parts of toys..... | V, 483 | Unusual— | |
| Mercerized selvage, not mercerized.. | III, 236 | cases reviewed..... | IV, 122 |
| With silk selvages not cloth of cot- ton and silk..... | I, 223 | Drums containing creosote oil..... | I, 312 |
| Embroideries, artificial silk chief value. | II, 125 | Employed by only one firm..... | III, 62 |
| Gloves— | | Water in which canned peas are im- mersed, not..... | V, 167 |
| Knitted or woven, what are knitted..... | III, 368; V, 441 | When excepted from general rule..... | II, 61 |
| Means all or nearly all cotton..... | IV, 298 | Creosote oil, characteristics and require- ments..... | IV, 268 |
| Hollands cut and hemmed not cotton cloth..... | III, 191 | Crucibles, porcelain, are not earthenware crucibles..... | IV, 462 |
| Ladder tape held not to be tape.. | III, 378; IV, 95 | | |
| Linters not cotton waste..... | I, 246 | | |
| Manufactures of; rag pulp held to be.... | II, 364 | | |
| Table damask, cotton and linen damask is not..... | IV, 430 | | |
| Tape, ejusdem generis rule inapplicable | I, 374 | | |
| Tapestries as upholstery goods..... | III, 115 | | |
| Waste— | | | |
| Bleached, as not advanced..... | II, 222 | | |
| Cotton linters not..... | I, 246 | | |
| Waterproof velvet as waterproof cloth.... | V, 215 | | |
| Yarn, viscose coated, as artificial horse- hair..... | III, 75 | | |

| | Volume and page. | | Volume and page. |
|--|--|--|--|
| Crude: | | Damask— | |
| Article is, if additional process is necessary to fit it for use..... | II, 522 | Cotton, table, means wholly of cotton.. | IV, 430 |
| Articles may be result of manufacturing process..... | II, 522; V, 347 | Not a plain woven fabric..... | II, 327; III, 382 |
| Crudest form imported as a test..... | II, 222, 485; IV, 522 | Date— | |
| Definitions and scope, review of cases.... | II, 485; IV, 134; V, 347 | Of exportation is date of clearance..... | I, 290 |
| Gum tragacanth, result of elaborate manufacturing process, is..... | II, 522 | Of exportation is date of consular invoice..... | I, 149 |
| Hydroxide of chrome requiring further treatment..... | II, 165 | Of importation—countervailing duty.. | I, 242 |
| Minerals— | | Decalcomanias— | |
| Ground corundum not..... | I, 506 | As lithographic prints..... | II, 197 |
| Ground ore is not free as..... | V, 196 | In ceramic colors; punctuation..... | IV, 1 |
| Marble waste crushed and screened not free as..... | I, 280 | De minimis noncurat lex..... | I, 223; III, 177, 193 |
| Sawed stone polishers are not..... | III, 406; V, 188 | Dead oil and creosote oil synonymous.... | IV, 268 |
| Naturally refined sulphur is not crude. | IV, 134 | Decisions—point not argued not decided.. | III, 130 |
| Need not be in natural or raw state.... | V, 347 | Decorated, enumeration of, implies susceptibility of decoration..... | I, 93, 300; II, 368 |
| Rosin, strained, held to be..... | II, 485 | Decoration, articles susceptible of. I, 93, 300; II, 368 | |
| Crushed marble not free as crude mineral. | I, 280 | Dictionaries not conclusive as to meaning of words..... | IV, 274 |
| Cuba, iron rails scrapped in Cuba, not products of Cuban industry..... | IV, 500 | Direct shipment: | |
| Currency valuation date of exportation.... | I, 149 | May permit transshipment..... | I, 450; II, 100 |
| Curtains: | | Meaning of term..... | I, 404 |
| And screens synonymous..... | III, 390 | Disks: | |
| Bead. (See Bead curtains.) | | Aluminum, not classifiable as sheets... V, 514 | |
| Customhouse, hours of business at. I, 69, 415; III, 479 | | Phonograph, are parts of phonographs.. | IV, 279 |
| Customs administrative act of 1909..... | V, 2 | Dogskin mats as fur material..... | IV, 332 |
| Customs regulations: | | Domicile and residence; distinctions..... | V, 363 |
| Article 208, act of 1908..... | III, 256 | Drawn work: | |
| Article 1241, act of 1899..... | II, 252 | Articles as articles in part of lace..... | III, 216 |
| Article 88, act of 1908..... | III, 106 | Articles, legislation and litigation reviewed..... | V, 273 |
| Articles 445–447, act of 1908..... | V, 336 | Drawplates are not plates, but forgings.... | II, 4 |
| Articles 570, 571, act of 1908..... | II, 537 | Drayage charges must not exceed usual rate. | IV, 363; |
| Articles 585–588..... | IV, 93 | V, 307 | |
| Article 581, act of 1908..... | II, 153 | Dress buttons defined..... | I, 542 |
| Article 894, act of 1908..... | V, 511 | Dressed fibers. (See Vegetable fibers.) | |
| Article 897, act of 1908..... | II, 154 | Dried fruit, definition of term..... | V, 89 |
| Article 944, act of 1908..... | III, 71 | Drugs advanced— | |
| Article 1491..... | IV, 520 | Essential oils are not..... | IV, 109 |
| Article 1495, act of 1908..... | III, 71; IV, 520 | Extracts and sirups are not..... | IV, 325 |
| Article 1497, act of 1908..... | III, 72 | Fustic..... | II, 374 |
| Article 1543, act of 1908..... | II, 156 | Drumheads, parchment pieces for..... | IV, 84 |
| Article 1072, act of 1908..... | V, 437 | Drums: | |
| Article 1073, act of 1908..... | V, 149, 437 | Containing creosote oil are unusual coverings..... | I, 312 |
| Article 1075, act of 1908..... | V, 355 | Iron, as cylindrical vessels..... | I, 152; II, 57; III, 94, 234 |
| Article 1596 et seq., act of 1908..... | V, 513 | Duplex transfer paper as paper with a coated surface..... | II, 459 |
| Section 4, act of 1890..... | II, 215, 240 | Duress: | |
| Section 10, act of 1890..... | I, 291 | Additions to avoid penalty held to be under..... | I, 36, 478 |
| Section 14, act of 1890..... | I, 58, 64; III, 34 | Definitions of, additions on entry..... | I, 36; 478; III, 343; IV, 320; V, 137, 447 |
| Section 19, act of 1890..... | I, 291, 312, 465, 477; II, 215; III, 130 | Immaterial, unless resulting in injustice..... | V, 447 |
| Section 23, act of 1890..... | I, 58 | Invoicing to comply with prior reappraisement is not..... | I, 36, 478; IV, 320; V, 137 |
| Cylindrical vessels: | | Duties: | |
| Cans containing tomatoes are not..... | II, 30 | Estimated, deposit of, is payment..... | I, 189 |
| Iron drums filled as..... | I, 152; II, 57; III, 94 | Recovery of excess—Congress controls method of procedure..... | I, 181 |
| Scope of provision for..... | I, 152, II, 30, 57; III, 94, 234; IV, 132 | Refund of, goods that have been exported..... | V, 334 |
| Tank containing acid for college..... | II, 440 | When right to, attaches..... | II, 332 |
| Damage constituting nonimportation..... | II, 332, 336; III, 164, 198, 209, 265 | | |

(See also Nonimportation.)

- | | Volume
and page. | | Volume
and page. |
|---|--|--|-------------------------------------|
| Duty, "rate of," held to mean amount of... | I, 297; | Enfleurage grease, muguet de Mai as..... | I, 128 |
| | III, 333, 339 | Engines, steam, rock drills are not..... | V, 481 |
| Dyeing adds a new material..... | IV, 446, 455 | Entered value: | |
| Ear caps, children's, not wearing apparel..... | I, 49 | Effect of duress on..... | I, 36 |
| Earth, volcanic, for mud baths, not a medicinal preparation..... | IV, 15 | Minimum basis for duty..... | IV, 320 |
| Earthenware: | | Entireties: | |
| And porcelain distinguished..... | IV, 462 | Cast iron linings in pieces as..... | II, 475 |
| Carmelite ware as enameled..... | II, 85 | Furnished needle cases..... | II, 361 |
| Enameled defined..... | II, 85; III, 193 | Incomplete articles are not..... | V, 362 |
| Enameled, not applicable to yellow earthenware..... | V, 76 | May be separated for duty purposes... V, 364 | |
| Printed, what is..... | III, 193 | Mirror with comb as a mirror..... | III, 224 |
| Rockingham, defined and described... III, 420 | | Monument and pedestal as..... | IV, 508 |
| Yellow, coated with white glaze..... | V, 76 | Pine cones containing nuts are not.... V, 516 | |
| Earthy substances, articles of, Seger cones as..... | IV, 478 | Entry: | |
| Edible olive oil, tests of..... | I, 263; II, 275 | Arrival of vessel must precede..... | I, 415 |
| Education is not confined to training of the mind..... | V, 251 | Defined as filing of entry paper..... | I, 189, 293; II, 537; III, 137, 384 |
| Effects. (<i>See</i> Household effects; Personal effects.) | | For consumption; goods intended for export..... | V, 334 |
| Eggs: | | For withdrawal from bond is an entry.. III, 137 | |
| Fish, legislation and litigation reviewed..... | V, 388 | Implies presence of merchandise at time of..... | I, 107, 415 |
| Shelled, dutiable at dozen rate..... | I, 138 | Incomplete, charges for cartage and storage..... | III, 450 |
| Whites and yokes of, dutiable as eggs... I, 138; III, 178 | | Mail, goods imported by parcel post... IV, 287 | |
| Electric light bulbs not dutiable as artificial fruits..... | V, 418 | Of goods before arrival of vessel properly refused..... | I, 415 |
| Embossed— | | Offered after close of business at custom-house..... | I, 69, 415 |
| Leather, definitions and distinctions.. II, 80; III, 356; V, 212 | | On pro forma invoice— | |
| Paper articles— | | American goods returned..... | II, 537 |
| Embossed post cards not..... | IV, 234 | Does not remain "Open"..... | II, 249 |
| Paper in sheets not..... | IV, 240 | Review of cases..... | II, 239, 249 |
| Paper as paper with a surface design... II, 65; III, 392; IV, 240 | | Tender of, in absence of goods, ineffective..... | I, 107, 415 |
| Post cards, indented effect..... | II, 347 | Tender of, in absence of inspector..... | II, 288 |
| Embroidered: | | Without invoice, illegal..... | I, 61; II, 288 |
| Fans exempt from embroidery proviso.. II, 101 | | Erasers, metal, with fixed blades..... | II, 296 |
| Gloves more than three strands or cords..... | I, 323; II, 106; III, 321; IV, 338; I, 279; II, 454; V, 412, 477 | Error. (<i>See</i> Clerical error.) | |
| Initial worked with embroidery stitch is..... | II, 186 | Established practice. (<i>See</i> Construction.) | |
| Parasols as embroidered articles..... | III, 401 | Evidence: | |
| Screens as embroidered articles. II, 181; III, 488 | | Admissions by customs officers not admissions against Government.... V, 336, 435 | |
| Shoes as embroidered wearing apparel.. I, 5 | | Admitted by board not necessarily "competent" in court..... | III, 10 |
| Embroidery: | | Affidavit not competent evidence..... | I, 404; III, 10, 142; IV, 271 |
| Artificial silk on cotton net..... | II, 125 | Affidavits—when competent evidence.. III, 198 | |
| Implies ornamentation..... | II, 186 | Analysis must be identified with samples..... | IV, 452, 494 |
| Proviso— | | Appraisers' reports on protests..... | V, 311 |
| Act of 1909..... | II, 125; III, 401 | Appraisers' reports on protests when not..... | V, 435 |
| Review of..... | II, 181; III, 401 | As to antiquity of furniture rejected... IV, 474 | |
| Scalloping not..... | III, 263 | As to customs practice, when inadmissible..... | III, 10 |
| Enamel: | | As to quantity of beer contained in barrels..... | IV, 406; V, 158 |
| And enamel colors distinguished..... | III, 387 | As to reasonableness of drayage charges. IV, 363 | |
| Colors as colors containing lead..... | I, 216 | Board may reverse collector without taking any..... | I, 323; IV, 49 |
| Fusible and glass distinguished..... | V, 496 | Best, failure to present not accounted for. V, 191 | |
| White paint. (<i>See</i> Paint.) | | Books not introduced in, may be consulted by court..... | I, 82; II, 353; III, 240; V, 416 |
| Enameled— | | | |
| Earthenware described..... | II, 85 | | |
| Hollow ware, gas burners are not..... | V, 61 | | |

| Evidence—Continued. | Volume and page. | Evidence—Continued. | Volume and page. |
|---|--|---|-------------------------------|
| Burden of going forward with proof.... | V, 82 | Required to establish commercial designation..... | I, 328, 527; IV, 9 |
| Burden of proof in case of reliquidation on ground of fraud..... | V, 151 | Required to rebut presumption of official correctness..... | I, 146 |
| Burden of proof never shifts..... | V, 82 | Samples, burden of sufficiency of Government..... | I, 178, 362; II, 456; III, 52 |
| Burden of proof— | | Testimony rejected as unconvincing.... | V, 312 |
| On importer. I, 360; II, 159, 427, 505; V, 393 | | Trade catalogues as..... | IV, 313 |
| When not on importer..... | I, 178, 362; III, 180, 325, 219; V, 40, 244 | When very slight evidence suffices..... | II, 505 |
| Certificates of foreign chambers of commerce..... | I, 132 | Examination: | |
| Certificate of seller, when admissible.... | II, 338 | Actual, necessary in reappraisement.... | I, 385 |
| Commercial, preferred to scientific.... | III, 83 | Of goods by appraising officers..... | III, 447 |
| Commercial, to explain descriptive phrase in tariff..... | I, 328, 346; II, 247 | Sufficient quantity for..... | I, 316 |
| Declarations before consuls, R. S. 1707. | III, 10 | Excess, goods in, additional duty on..... | II, 278 |
| Entries in book can not be proved by one who did not make them..... | IV, 102 | Exportation: | |
| Exhibits as..... | I, 168, 178, 323; II, 105, 353, 439, 454, 456; III, 193, 468 | Date of, currency valuation..... | I, 149 |
| Experimental knowledge alone insufficient..... | I, 166 | Date of, for value purposes..... | I, 290 |
| Expert, and opinion; function and value..... | V, 191 | Meaning in reciprocity agreements.... | I, 404 |
| Failure of customs officials to identify sample..... | IV, 452, 494; V, 36 | Exported goods, refund of duties on..... | V, 355 |
| Failure to produce sample analyzed does not impeach the analysis..... | IV, 19 | Extracts, liquid and solid distinguished.... | IV, 129 |
| Findings of fact by General Appraisers reviewable..... | I, 19, 263; II, 278 | Fabrics: | |
| If insufficient for liquidation purposes, importer must fail..... | II, 427 | Asbestos, special provision for..... | V, 320 |
| Importer must affirmatively establish his claim..... | I, 360; II, 159, 427 | Coating of flock not part of..... | II, 479 |
| Improperly admitted, stays in, in absence of motion to strike out.... | II, 355; III, 5 | Plain woven, damask not..... | II, 327, 352; I |
| In one case applied in other cases by board..... | I, 513, 527, 546; II, 59, 51; III, 77, 468; IV, 266 | Selvage held not to be a part of.... | I, 223; III, 236 |
| Judicial notice, distinctions..... | I, 168; II, 353, 456; III, 193 | Fancy matches defined and distinguished.... | IV, 66; V, 77 |
| Knowledge of witnesses as to use..... | I, 122; II, 159, 483 | Fans: | |
| Of competent witness sufficient without samples..... | II, 405 | Embroidered, not subject to embroidery proviso..... | II, 101 |
| Of interested witnesses..... | III, 387 | tissue paper, as manufacture of tissue paper..... | II, 236 |
| Of one witness may be sufficient..... | V, 312 | Favored-nation clauses in treaties. (See Treaties.) | |
| Oil identified by physical appearance.... | IV, 494 | Feather— | |
| On appeal, excluded testimony to be included in..... | I, 203, 545 | Boas dutiable at same rate as dressed feathers of which made..... | II, 39 |
| One witness to prove common use. I, 122; II, 483 | | Dusters, small, used as "ticklers" not toys..... | IV, 27 |
| Parole admitted to supply omission in public record..... | V, 351 | Feathers, ornamental, a specific provision.. | II, 112; II, 290 |
| Photographs not conclusive..... | V, 191 | Felt, polishing, as wool felt..... | II, 389 |
| Presumptions that official samples are representative..... | I, 178, 362; II, 456; V, 371 | Ferromanganese and manganese metal are different..... | III, 187 |
| Prior decisions not evidence to prove commercial designation unless identity of merchandise proved..... | IV, 77, 503; V, 198, 357, 435 | Fiber; fibers. (See Vegetable fibers.) | |
| Prior decisions treated as..... | V, 404 | Figured cotton cloth, what are ordinary threads..... | I, 73 |
| Proper procedure when question objected to..... | I, 345; II, 355; IV, 313 | Films, cinematograph, as photographs..... | I, 51 |
| Record in earlier case treated as..... | V, 404 | Fireworks sparklets not toys..... | I, 109 |
| Required to establish claim of shortage.... | II, 189; IV, 102; V, 173 | Fish: | |
| | | American-caught in Canadian waters of Great Lakes..... | V, 130 |
| | | Anchovies, brislings, sardines, and sprats are herrings..... | V, 256 |
| | | Balls as fish in tins..... | IV, 467 |
| | | Fresh and frozen distinguished..... | V, 331 |
| | | Fresh fish packed in ice not classifiable as..... | V, 331 |
| | | Herring family; various small fish included..... | V, 256 |
| | | Herrings in oil as fish packed in oil.... | V, 40 |
| | | Herrings pickled, skinned, and boned.... | IV, 471 |
| | | Herrings, kippered, pickled, smoked.... | I, 304; II, 471; IV, 70 |
| | | In half barrels a specific provision..... | V, 331 |

| Fish—Continued. | Volume and page. | Fur—Continued. | Volume and page. |
|--|-----------------------|---|------------------|
| In pound packages imported in large | | Skins—Continued. | |
| wooden cases..... | I, 341 | Gooseskins with down on as..... | I, 321 |
| In tins— | | Pointed fox skins are a manufacture | |
| Less specific than salt herring..... | IV, 70 | of fur..... | II, 267 |
| More specific than fish salted..... | V, 556 | Repaired are nonenumerated man- | |
| No allowance for liquid in..... | IV, 401 | ufactured articles..... | II, 177 |
| Review of cases on..... | II, 471 | Sheepskins free as..... | I, 272 |
| Incidental salting makes it salt fish..... | IV, 70 | Furniture: | |
| Incidental salting makes it salt fish, | | And furnishings distinguished..... | II, 181 |
| contra..... | V, 40 | Baskets are not..... | II, 17 |
| Kipperd herring in tins..... | I, 304 | Definition of partly finished..... | II, 68 |
| Packed in oil, herrings in oil dutiable as. | V, 40 | Turned and bent wood for chair legs as. | II, 68 |
| Packed in oil, origin of oil immaterial.. | V, 527 | Furs a commercial term..... | II, 209 |
| Roe preserved, roe dried in the sun as.. | V, 388 | Fusible enamel and glass distinguished.... | V, 496 |
| Fisheries, American, what are..... | I, 515 | Fustic dyewood, cut or shredded..... | II, 374 |
| Fishing tackle, unfinished floats not parts | | Gallilith combs as horn combs by similitude | II, 203 |
| of..... | I, 529 | Gallon. (<i>See</i> Measurement.) | |
| Fitted leather cases, traveling sets defined.. | II, 393; | Galloons and trimmings not ribbons..... | II, 43 |
| IV, 49, 274 | | Galvanized-iron sheets over 3 cents per | |
| Fixtures and utensils distinguished..... | V, 61 | pound..... | I, 115 |
| Flexible copper tubing not copper pipes.... | II, 221 | Garlic tops not allowable as tare..... | III, 171 |
| Flowers, dyed natural, not classifiable as | | Gas burners are not hollow ware..... | V, 61 |
| natural flowers..... | IV, 446, 465 | Gaufrage leather, embossed leather is. II, 80; | III, 463 |
| Forgings: | | Gelatin: | |
| Hoes ground on a stone, not..... | II, 350 | In sheets, what are sheets; cases re- | |
| Machined, as forgings..... | I, 550 | viewed..... | III, 475 |
| Unfinished blades for scissors are not.. | V, 485 | Post cards as lithographic prints..... | I, 82 |
| Fountain pens: | | Ginger, stem and cargo, is a sweetmeat.... | I, 113 |
| Are not penholders..... | II, 410 | Glass: | |
| Complete except for pen point..... | IV, 100 | And fusible enamel distinguished..... | V, 496 |
| Frames and paintings are classifiable sepa- | | And paste distinguished..... | V, 304 |
| rately..... | V, 222 | Articles blown and ground..... | V, 56 |
| Fraud: | | Articles blown in a mold as blown glass. | V, 56 |
| Reliquidation after one year..... | V, 2 | Bottles, wicker-covered, as manufac- | |
| Reliquidation after one year, burden of | | tures of willow..... | IV, 496 |
| proof..... | V, 151 | Buttons, paste buttons not dutiable as. | V, 304 |
| Free-list provision not to prevail over du- | | Colored in the pot, as colored glass..... | II, 411 |
| tiable provision..... | II, 70 | Disks bent are not for that reason | |
| French chalk, talc not synonymous with.... | III, 522 | deemed manufactured coquille glasses | IV, 21 |
| Fruit: | | Powdered, as a manufacture of glass... V, 489 | |
| Dried, definition of term..... | V, 89 | Tubes, caps for are not bottle caps..... | V, 423 |
| Rotten. (<i>See</i> Nonimportation.) | | Glasses, coquille, bent disks are not..... | IV, 21 |
| Shaped articles not necessarily artificial | | Glassware, stem, composed of blown and | |
| fruits..... | IV, 384; V, 418 | molded glass..... | V, 298, 401 |
| Fruits: | | Glazed hollow ware, scope of provisions | |
| Artificial. (<i>See</i> Artificial fruits.) | | for..... | II, 451; IV, 281 |
| In brine, Japanese umeboshi free as..... | V, 159 | Glazing stones are articles of mineral sub- | |
| In brine, percentage of salt necessary.. | IV, 98 | stance..... | II, 425 |
| In spirits, cherries in maraschino as.... | I, 239 | Glove leather defined..... | I, 54 |
| In sugar, cherries in maraschino as.... | III, 230 | Gloves: | |
| Preserved— | | Artificial silk, as vegetable fiber gloves. | I, 86 |
| Berries in sirup as..... | I, 287 | Cotton knitted, meaning of knitted.... | III, 368; |
| Chutney as..... | I, 328 | V, 441 | |
| Plums in tins as..... | IV, 422 | Embroidered with more than three | |
| Prunes boiled and pressed are..... | III, 247 | strands or cords..... | I, 279, |
| Fur: | | 323; II, 105, 454; III, 321; IV, 338; V, 412, 477 | |
| Clippings, free as furs undressed..... | I, 198 | Glycerin, crude and refined—distinctions. | IV, 19 |
| Crosses, linings, etc., as manufactures of | | Goods— | |
| fur..... | II, 172, 167; IV, 332 | In the piece; review of cases..... | V, 110 |
| Manufactures of, omission of provision | | Under examination when law changes. | I, 189 |
| for..... | IV, 177 | Goose skins with down on, as fur skins.... | I, 321 |
| Rugs are manufactures of fur as mater- | | Gothrough. (<i>See</i> Lever.) | |
| ial..... | II, 167; IV, 332 | Grain leather, definition of..... | II, 270 |
| Skins— | | Granite monuments in sections or pieces | |
| A commercial term..... | II, 209 | as dressed granite..... | I, 510 |
| Dutiable value of..... | I, 61 | | |

| | Volume and page. | | Volume and page. |
|---|------------------------|--|------------------------|
| Granito as a nonenumerated manufactured article..... | I, 280 | Horsehair: | |
| Grapes destroyed in transit allowed for.... | III, 265 | Artificial. (<i>See</i> Artificial horsehair.) | |
| Grasses: | | Braids as similar to silk braids..... | V, 104 |
| And palms—confusion of samples .. | III, 219 | Hats and braids as articles of imitation horsehair..... | III, 87 |
| Dyed and prepared are not manufactures of grass..... | V, 85 | Hats as similar to silk hats..... | V, 104 |
| Sun-dried, not ornamental leaves; cases reviewed..... | III, 260 | Horse-radish roots, crude, are not vegetables..... | IV, 142, 145 |
| Grease: | | Hyacinth bulbs are not hyacinth clumps.. | II, 26 |
| Fit only for leather dressing: evidence.. | V, 28 | Hydron blue from carbazol, a coal-tar color. | IV, 113 |
| Wool. (<i>See</i> Wool grease.) | | Hydroxide of chrome a crude substance... | II, 165 |
| Grindstones, definition and scope of term. | III, 67 | Ichthyol ammonium free as ichthyol..... | II, 465 |
| Guaiacol carbonate, as nonalcoholic..... | II, 59 | Imitation— | |
| Gubinol metal leaf, method of measuring .. | V, 33 | Bronze statuary as manufacture of metal..... | II, 451 |
| Gum— | | Horsehair. (<i>See</i> Artificial horsehair.) | |
| Resin, crude, rosin held to be.. | II, 485; III, 440 | Jet goods not jewelry..... | I, 457; II, 283 |
| Tragasol as a crude article..... | II, 462, 522 | Parchment paper, definitions and characteristics..... | IV, 29 |
| Gut strings— | | Pearl beads dutiable as beads..... | V, 93, 339 |
| For musical instruments. (<i>See</i> Musical instruments.) | | Precious stones, when jewelry..... | III, 509 |
| Twisted into a cable as manufactures of gut..... | V, 421 | Immediate transportation goods spoiled en route..... | IV, 116 |
| Habutal silk is silk boiled off | I, 346 | Immortelles, dyed, as ornamental flowers. | IV, 445, 446 |
| Hair— | | Implements and fixtures distinguished.... | V, 61 |
| Clippers are not machine tools..... | II, 329 | Impurities constituting tare..... | II, 338 |
| Clippers are not shears..... | II, 109 | In the piece, coat hangers: review of cases. | V, 110 |
| Goods, cattle, as wool goods..... | II, 389 | India rubber and cotton braids. (<i>See</i> Braids.) | |
| Rolls, "rats," as wearing apparel..... | I, 170 | India rubber refuse, recovered rubber is... | I, 513 |
| Hams in tins are dutiable as hams and not as prepared meat | IV, 64 | Indigo extracts or pastes, no distinctions.. | IV, 510 |
| Hand-power machines. (<i>See</i> Machine tools.) | | Individuals includes corporations. III, 528; IV, 458 | |
| Handmade printing paper is handmade .. | II, 237 | Initials as embroidered..... | II, 186 |
| Harmonicas, unusual coverings for..... | IV, 122 | Inlaid linoleum. (<i>See</i> Linoleum.) | |
| Harness and saddlery, definitions..... | II, 46 | Institution for educational purposes, athletic club as | V, 251 |
| Hat sweats as manufactures of leather.... | III, 97 | Internal revenue rulings not controlling.... | I, 146 |
| Hats: | | Invoice: | |
| Horsehair, as similar to imitation horsehair hats..... | II, 87 | Consular and pro forma, differing in value..... | II, 239, 249; III, 256 |
| Horsehair, as similar to silk hats..... | V, 104 | Declarations not controlling... I, 29, 360; V, 121 | |
| Horsehair, imitation, as straw hats.... | III, 57 | Entry without, cases reviewed..... | III, 450 |
| partly made, straw plateaux are..... | II, 89 | Statements in as to seller, may be explained..... | V, 121 |
| Straw, trimmed and untrimmed..... | IV, 322 | Iron— | |
| Hatter's plush; test for duty purposes .. | II, 532; IV, 285 | Castings— | |
| Hauteville stone dutiable as marble..... | I, 25 | Finished parts as..... | IV, 304 |
| Hematite iron ore dutiable as iron ore, and not as a pigment..... | III, 83 | Fireplace interiors not..... | II, 475 |
| Herring. (<i>See</i> Fish.) | | Nickel-plated, not classifiable as castings..... | V, 410 |
| Hides: | | Grinders not cast-iron plates..... | I, 29 |
| And skins distinguished..... | V, 117 | Ore— | |
| From American cattle slaughtered abroa..... | I, 336; III, 1 | Hematite, held not a pigment..... | III, 83 |
| Tare on, percentage to be examined .. | I, 316 | Means that suitable for smelting.... | III, 83 |
| Highest-rate rule, applicability of..... | I, 120; II, 70; V, 459 | Pile protectors rolled and punched as manufactures of metal..... | V, 474 |
| Hollow ware: | | Scrap. (<i>See</i> Scrap iron.) | |
| Cast, scope of provision for..... | IV, 281 | Sheets coated, nickel and iron sheets are not..... | II, 162 |
| Cast, means kitchen utensils..... | II, 451 | Sheets, corrugated and galvanized..... | I, 115 |
| Enameled, gas burners are not..... | V, 61 | Sheets, galvanized, over 3 cents per pound..... | I, 115 |
| Hones and whetstones, stones for marble polishing not..... | III, 406 | Isarol held free of duty as ichthyol..... | II, 465 |
| Hoop poles as round unmanufactured timber..... | V, 79 | Istrian stone as marble..... | I, 25 |

| | Volume and page. | | Volume and page. |
|--|---------------------|--|--------------------------|
| Jacquard— | | Laches, hearing on merits denied because of | IV, 231 |
| Figured upholstery goods..... | III, 115 | Lacquered— | |
| Silks, "two colors in the filling"..... | I, 178 | Metal boxes (1909) means containers.... | IV, 242 |
| Jam as sweetmeats or fruits preserved..... | I, 144 | Tin boxes containing paints..... | II, 299 |
| Japanese fruits in brine; umeboshi and umezuki..... | V, 159 | Lactere and casein synonymous..... | II, 292 |
| Jellies— | | Lakes containing lead as colors containing lead..... | I, 32 |
| And sweetmeats distinguished.. I, 144; III, 247 | | Lambskins and sheepskins distinguished.. | V, 315 |
| Definitions and distinctions; bar-le-Duc not..... | V, 371 | Landing, port of, immediate transportation goods..... | IV, 116 |
| Jet— | | Lanolin as medicinal preparation..... | III, 316 |
| And imitation jet distinguished..... | II, 283 | Lava stone when building stone. III, 72, 486; IV, 110 | |
| Imitation, articles of not jewelry.. I, 457; II, 283 | | Lead— | |
| Jewelry: | | Bullion, type metal is not..... | II, 231 |
| Bead necklaces are classifiable as..... | V, 28 | Contained in copper matte, no duty on.. | V, 398 |
| Goods commonly known as..... | II, 11 | Ore containing zinc..... | I, 472 |
| Imitation jet and metal goods are not..... | I, 457; II, 283 | Products from bonded smelters..... | II, 231 |
| Imitation precious stones as..... | III, 509 | Leaf, metal, in double sheets; how counted.. | V, 33 |
| Lace pins as..... | IV, 87, 386 | Leakage— | |
| Lace pins not..... | V, 296 | Of ale, allowed for..... | III, 291 |
| Legislation and litigation reviewed. I, 457; II, 11 | | Of sake..... | II, 305, 371; V, 380 |
| Scope of paragraph 448, act 1909.. III, 273, 288; IV, 378 | | Of wine, no allowance for..... | II, 340 |
| Watch compasses are not parts of..... | V, 382 | Leather: | |
| Watch, reconstructed rubies as..... | V, 336 | Apron and picker, as belting leather.. I, 537; III, 353 | |
| Juice, fruit (see Fruit juice). | | Book backs as manufactures of leather. III, 444 | |
| Jurisdiction: | | Calfskins tanned and dressed more specific than grain leather..... | IV, 58 |
| Defect in not waived by going to trial on the merits..... | II, 355 | Cases as smokers' articles..... I, 377; II, 384 | |
| Question may be raised at any stage of proceedings..... | V, 373 | Cases containing automobile tools, not "traveling sets"..... | II, 393 |
| (See also Courts; Board of General Appraisers; Antiquities.) | | Chamois skins with scalloped edges not manufactures of..... | V, 125 |
| Jute butts and jute rejections described.... | V, 183 | Cut into forms— | |
| Card waste as jute not dressed..... | II, 431 | Automobile treads as..... III, 442; V, 91 | |
| Description of plant and process of preparation..... | V, 183 | Cylinder leather as..... | III, 373 |
| Goods more than 98 per cent jute are "made of jute"..... | V, 183 | Need not be cut with precision.... | V, 91 |
| Manufacturing machinery, chief use governs..... | III, 436; IV, 301 | Picker straps as..... | III, 353 |
| Masunoko, sun-dried, as preserved fish roe. | V, 388 | Scope of proviso..... | III, 356 |
| Knitted— | | Versus manufactures of leather..... | III, 97, 442, 444 |
| Gloves, what are included..... | III, 368 | Diced, is not gauffre leather..... | V, 212 |
| Mufflers are classifiable as mufflers..... | IV, 81, 496; V, 552 | Finished, readiness for use..... I, 379; III, 377 | |
| Knitting machines are not machine tools... III, 429 | | Fitted cases, traveling sets defined..... | IV, 49, 274; V, 249 |
| Knives: | | Gauffre, diced leather is not..... | V, 212 |
| Deer-foot hunting, not clasp knives... I, 255 | | Gauffre, means embossed..... | II, 80; III, 463 |
| Hunting, with folding blade..... | I, 255 | Glove, more specific designation..... | I, 545 |
| Pen, with letter-opener attachment.... | III, 239 | Grain and split, not confined to unfinished leather..... | II, 270; III, 356 |
| Labels: | | Grain, buff and split leather, means cattle leather..... | II, 129, 270 |
| Meaning and limitation of term..... | V, 385 | Rough, definitions and distinctions.... | I, 379; III, 377; V, 117 |
| Paper seals "Merry Christmas" are not.. | V, 385 | Rough, is from hides, not skins..... | V, 117 |
| Lac sprits, tetrachloride of tin as..... | II, 192 | Scope of proviso as to leather cut into forms..... | III, 356 |
| Lace: | | Reducing rates on..... | II, 129 |
| Articles in part of, drawnwork as..... | III, 216 | Skivers are not split leather..... | II, 129 |
| Handkerchiefs in chief value of Lever lace..... | II, 519 | Leaves and grasses, ornamental..... | I, 337; II, 427 |
| Made on Lever machine, articles trimmed with..... | V, 170 | Lever— | |
| Partly Lever, as lace made on the Lever machine..... | V, 246 | Lace, goods in part of, minimum duty.. | II, 519; V, 170, 246, |
| Pins as jewelry..... | IV, 87, 386 | Machines, history and characteristics of..... | V, 534 |
| Pins not jewelry..... | V, 296 | Lime powder a chemical mixture..... | II, 285 |

| | Volume and page. | | Volume and page. |
|---|--|---|---------------------------|
| Limestone, Hauteville, Istrian, etc., as marble..... | I, 25 | Manufactured: Manufactures of—Contd. | |
| Limitation of time for reliquidation..... | III, 456 | Cotton waste, bleached, etc., not manu- factured..... | II, 222 |
| Linoleum: | | Covering bottles with wicker is a..... | IV, 496 |
| Inlaid, stenciled linoleum as..... | I, 101 | Dyeing flowers is a..... | IV, 446, 455 |
| Sold at f. o. b. ship prices; market value of..... | V, 317 | Dyeing grasses not a..... | V, 85 |
| Liquidation: | | Fish balls of fish, flour, and milk, is a..... | IV, 467 |
| Date of, parcel-post importations..... | IV, 287 | Fur pieces sewed together are manu- factured of fur..... | II, 167 |
| Pending reappraisement is void..... | V, 351 | Fur skins "repaired" not manufacture of fur..... | II, 177 |
| Liquors: | | Hams boned, cured, and cooked, in tins, are hams and not prepared meat..... | IV, 64 |
| As to allowance for shortage.... | II, 189; III, 120 | Hat sweats as manufactures of leather..... | III, 97 |
| Packed 1 dozen in a case, loss by theft.. | III, 120 | Leather. (<i>See</i> Leather.) | |
| Lithographic— | | Locust pods chopped in coarse pieces, not..... | IV, 392 |
| Prints— | | Marble waste, crushed and screened..... | I, 280 |
| Box tops are..... | I, 434 | May be material for another manu- facture..... | II, 167 |
| Gelatin prints as..... | I, 34 | Melon seeds peeled, are manufactured articles..... | II, 388 |
| How thickness determined..... | IV, 94 | Metal shavings and parings as..... | II, 311 |
| Paragraph, act of 1909..... | IV, 234 | Mixing petroleum with a solution of soap is..... | V, 444 |
| Wall pockets not..... | I, 422 | Mixture with other materials when a..... | I, 400; III, 370 |
| Transfer paper. (<i>See</i> Paper.) | | Opium dried implies treatment subse- quent to becoming opium..... | V, 347 |
| Lithographically printed coated paper..... | II, 422 | Parchment paper with cotton back as..... | III, 370 |
| Lock washers, so-called, as washers..... | III, 77 | "Pointed" fox skins are manufactured of fur..... | II, 267 |
| Loss of goods after importation does not re- lieve from duty..... | II, 332, 336; IV, 51 | Process required to produce article does not result in a "manufacture" of that article..... | I, 518; II, 165, 485, 521 |
| Lumber: | | Pulp made from cotton rags as manu- factures of cotton..... | II, 364 |
| Measurement, trade custom governs.... | II, 76 | Rag pulp as a manufacture of cotton.... | II, 364 |
| Not further manufactured than sawed, etc., beaded lumber as..... | V, 541 | Recovered rubber not a..... | I, 518 |
| sawed "edges" are "skids"..... | II, 123 | Residuum from manufacturing process is not a..... | V, 404 |
| Macaroni not a perishable article..... | III, 164 | Steel strips coated with nickel as a..... | IV, 82 |
| Machine tools: | | Substituted process distinguished from additional process..... | I, 550 |
| Definition and distinctions..... | I, 226; II, 329; III, 410, 419, 429, 435, 503, 520 | Tomato paste as vegetables prepared.. | IV, 75 |
| Implies other than hand power..... | II, 329; III, 410, 419, 429, 435, 503, 520; IV, 63, 292 | Wall pockets in knocked-down con- dition..... | I, 422 |
| Machinery: | | Wheat, boiled, dried, and ground is..... | I, 437 |
| Belting, specific provision for..... | IV, 394 | Wood ground into flour is manufacture of wood..... | IV, 464 |
| Jute manufacturing, chief use governs..... | III, 436 | Wood turned and bent, for chair legs is..... | II, 68 |
| Madras cotton cloth, count of threads..... | III, 240 | Wreaths of artificial flowers are..... | I, 337 |
| Magic lantern slides as parts of toys..... | I, 370 | Zinc sheets painted and lithographed... .. | II, 137 |
| Mail, importations by parcel post, protest lies..... | IV, 287 | Manure, substances free as; cases reviewed..... | III, 496 |
| Malt extract, solid or condensed, coverings immaterial..... | IV, 505 | Maraschino, fruits in. (<i>See</i> Fruits.) | |
| Manganese metal and ferromanganese dis- tinguished..... | III, 187 | Marble: | |
| Manufactured and manufactures of—dis- tinctions..... | II, 39 | Columns held to be sculptures..... | IV, 389 |
| Manufactured: Manufactures of: | | Hauteville, Istrian, and other stone as. (<i>See</i> Hauteville stone.) | |
| Aluminum cut into disks and oblongs as..... | IV, 245; V, 514 | Mantels are not sculptures..... | III, 298, 473 |
| Chamois skin cut in sizes, with scal- loped edges, not manufactures of leather..... | V, 125 | Panels, carved, not sculptures..... | III, 461 |
| Change of name not necessarily in- volved..... | I, 506; II, 167 | Products not productions of a sculptor..... | IV, 35 |
| Chiffon cut into narrow widths not arti- cles of chiffon..... | II, 515; III, 215 | Statue and pedestal as entirety..... | IV, 508 |
| Colling wire makes it a manufacture of wire..... | V, 43 | Statue for athletic club held free..... | V, 251 |
| Cork floats are manufactures; cases re- viewed..... | I, 529 | Vase as a sculpture..... | II, 321; III, 124 |

| | Volume and page. | | Volume and page. |
|--|-------------------------------|---|---|
| Married woman, residence of, how determined..... | IV, 414; V, 341 | Minerals, crude—Continued. | |
| Matches, fancy, defined and distinguished..... | IV, 66; V, 77 | Ground corundum not..... | I, 506 |
| Materials: | | Ground ore is not free as..... | V, 196 |
| And manufactures distinguished..... | II, 212 | Mirrors: | |
| Coating or plating metal adds a new material..... | IV, 82; V, 410 | Parabolic, as plate glass bent..... | V, 528 |
| Dyeing adds a new material..... | IV, 446, 455 | Pocket mirrors with comb as..... | |
| Held to apply to completed articles..... | II, 361 | Mixed— | |
| Mixed, goods composed of. (<i>See</i> Mixed materials.) | | Goods, free and dutiable, held free..... | III, 224 |
| Predominance in quantity, not value, governing classification..... | II, 419; III, 390; V, 327 | Materials clause— | |
| Matte, copper, containing large percentage of lead..... | V, 398 | Fish balls in chief value of fish..... | IV, 467 |
| Measurement: | | Materials separately named in tariff..... | V, 418 |
| Alcohol in wine..... | III, 177 | Rule for determining chief value..... | II, 143, 505; III, 211; V, 298 |
| Bushel of apples, what is..... | III, 19 | Mixture of goods differing in classification..... | I, 316, 353, 362; III, 180, 325; V, 102 |
| Custom of trade, governs, not actual..... | II, 76 | Modeling clay—so-called plastilina..... | III, 220 |
| Gallon defined and discussed..... | V, 322 | Monuments in sections as dressed granite..... | I, 510 |
| Metal leaf in double-sheets..... | V, 33 | Mousseline bands. (<i>See</i> Chiffon.) | |
| Meat: | | Mouthpieces for pipes are smokers' articles..... | IV, 503 |
| Prepared. (<i>See</i> Prepared meat.) | | Mufflers— | |
| Slicing machines not machine tools..... | III, 520 | And scarfs distinguished..... | IV, 3 |
| Medicinal preparations: | | Knitted, dutiable as silk mufflers..... | IV, 38, 486; V, 552 |
| Characteristics of..... | III, 515 | Mushrooms. (<i>See</i> Vegetables.) | |
| Chief use as determining character of..... | III, 316 | Music rolls for player pianos as parts of musical instruments..... | V, 164 |
| Extracts and sirups are, and not drugs..... | IV, 327 | Musical instruments: | |
| Guaiacol carbonate as..... | II, 59 | Gut strings as strings for..... | III, 306; V, 301 |
| Menthol as..... | III, 515 | Music rolls for player pianos as parts of..... | V, 164 |
| Volcanic earth for mud baths is not..... | IV, 15 | Parchment drumheads..... | IV, 84 |
| Menthol as a medicinal preparation..... | III, 515 | Parts of, gut strings are not..... | V, 301 |
| Mesh bags: | | Strings for, are those ready for use..... | V, 301 |
| Silver, act of 1909..... | III, 117 | Strings for, are those used in the production of musical sounds..... | V, 301 |
| Gold and platinum..... | III, 273, 288 | Unfinished parts of..... | IV, 438, 470 |
| Metal: | | Nails of iron or steel exclude leather-head nails..... | IV, 252 |
| Articles in part of, a specific provision..... | II, 436; III, 350, 361, 408 | Necklaces, bead, classifiable as jewelry..... | V, 28 |
| Boxes, lacquered, as containers..... | II, 299 | Needle cases, furnished, as entreties..... | II, 361 |
| Coated paper, act of 1909..... | II, 302 | Needles, phonograph, as parts of phonograph..... | V, 498 |
| Leaf, method of counting double sheets..... | V, 33 | Nets, hair, made on Lever or Gothrough machines..... | V, 534 |
| Polish as a nonenumerated article..... | V, 100 | Nickel— | |
| Metallic articles bestowed as prizes; cases reviewed..... | III, 490 | And iron sheets not iron sheets coated..... | II, 162 |
| Metals unwrought: | | Coated steel strips as manufactures of metal..... | IV, 82 |
| Ferrolloys not..... | I, 158 | Plated iron castings are manufactures of metal..... | V, 410 |
| What are..... | I, 158 | Nicol prisms as manufactures of spar..... | V, 416 |
| Mica, cut or trimmed, definitions of..... | IV, 416 | Night lights— | |
| Millboards— | | And tapers distinguished..... | III, 128 |
| Are manufactures of pulp..... | I, 47 | In part of metal as metal articles..... | III, 350, 361, 408 |
| Cardboard or paper..... | II, 51 | Paraffin chief value as manufactures of wax..... | IV, 506 |
| Mill buttings free as firewood..... | V, 102 | Nonimportation: | |
| Mineral— | | Damage amounting to, statutory remedy..... | IV, 247 |
| Substance— | | Destruction of goods..... | II, 332, 336 |
| Articles composed of one substance..... | II, 425 | Destruction of goods, cases reviewed..... | III, 265 |
| Articles of, must have definite form..... | II, 92; III, 220, 363; V, 100 | Fruit entered under immediate transportation act..... | IV, 116 |
| Articles, polishing stones..... | III, 406; V, 188 | Goods destroyed on voyage, statute not limited to perishable goods..... | IV, 247 |
| Water— | | Grapes destroyed allowed as..... | III, 265; IV, 116 |
| Definitions and characteristics of..... | V, 244 | | |
| Japanese niguri held not to be..... | V, 244 | | |
| Minerals, crude: | | | |
| Breccia in blocks not..... | II, 70 | | |
| Crushed and sorted marble waste not..... | I, 280 | | |

- Nonimportation—Continued.**
- Proof of damage must be made in manner prescribed by statute or regulations therein authorized..... IV, 24, 247, 253; V, 73
- Nut locks held dutiable as washers..... III, 77
- Nuts in pine cones, dutiable weight of..... V, 516
- Oil:**
- Birch-tar, as leather dressing..... I, 122
- Coconut. (*See* Coconut oil.)
- Creosote, characteristics and requirements..... IV, 268
- Lubricating, as a nonenumerated manufactured article..... V, 444
- Olive. (*See* Olive oil.)
- Paraffine, containing castor oil..... IV, 452
- Rapeseed—
- Characteristics and uses of..... IV, 494
- Used in soap making..... II, 483
- Recovered, not wool grease..... I, 513; IV, 47
- Oils, combination of, mixture of petroleum and soap not..... V, 444
- Olive oil:
- Contents, and not capacity of container, determines classification..... IV, 139, 140, 358; V, 322, 377
- Edible, tests and requirements.. I, 263; II, 275
- Treasury regulation held invalid..... V, 377
- Olives, ripe, as "olives" (1909)..... II, 317
- Olympic Club, of San Francisco, an educational institution..... V, 251
- Onionskin paper not a printing paper..... II, 206
- Openwork articles, legislation and litigation reviewed..... V, 273
- Opium:**
- Derivation and process of preparation.. V, 347
- Dried in process of making, is not dried opium..... V, 347
- Ore:**
- Containing both lead and zinc..... I, 472
- Hematite iron, not dutiable as pigment. III, 83
- Iron, means that suitable for smelting.. III, 83
- Owner of goods, consignee is, in customs law. IV, 262
- Packages:**
- Definition and application of term..... I, 341
- Undivided, defined..... II, 274
- Paint boxes, lacquered, as containers..... II, 299
- Paintings and frames are classifiable separately..... V, 222
- Palm leaves dyed and preserved as ornamental leaves..... V, 85
- Palms, dyed palm leaves are not..... V, 85
- Phonograph machines are not machine tools..... IV, 63
- Paper:**
- And pulp distinguished..... II, 55
- Articles embossed, die-cut, etc. (1909).. III, 183; IV, 234, 240, 411
- Articles stamped out of metal-coated paper..... IV, 411
- Boards held manufactures of paper.... I, 47
- Boxes, double enumeration of (1909).. I, 120
- Cards die-cut and printed, act of 1909.. III, 183
- Cigarette, not used for cigarettes..... I, 497
- Paper—Continued.**
- Colored means having a color..... II, 78
- Copying, colored defined..... II, 78
- Decorated in the pulp-checked design..... II, 65
- Duplex litho-transfer paper as paper with a coated surface..... II, 45
- Embossed as paper with a surface design..... II, 65; III, 392; IV, 240
- For wall paper is not printing paper II, 397
- Handmade printing, as handmade.... II, 237
- Imitation parchment, definitions and characteristics..... IV, 29
- Kraft paper not printing paper..... II, 247
- Leaves as artificial leaves..... V, 124
- Lithographed box tops, as lithograph prints..... I, 434
- Lithographed, printed surface coated.. II, 422
- Metal-coated, act of 1909..... II, 302
- Millboards as manufactures of pulp... I, 47
- Onionskin not a printing paper..... II, 206
- Parchment, with cotton back, as manufactures of paper..... III, 370
- Plain, coated paper is not..... IV, 411
- Printing paper a class of papers..... II, 247, 397
- Seals held not to be labels..... V, 385
- Surface-coated, oil-impregnated paper is not..... IV, 11
- Wall pockets as manufactures of..... I, 422
- With coated surface not a trade designation..... II, 459
- Wrapping, not wood pulp..... II, 55
- Parabolic mirrors as plate glass bent..... V, 528
- Paraffin is a variety of mineral wax..... IV, 506
- Parasols:**
- As toys..... IV, 9
- Embroidered, as embroidered articles. III, 401
- Paraffine oil containing castor oil..... IV, 452
- Parchment—**
- Paper, paper with cotton back not.... III, 370
- Pieces of drumheads..... IV, 84
- Partly—**
- Finished mouthpieces are smokers' articles..... IV, 503
- Manufactured—**
- Furniture..... II, 68
- Hats..... II, 89
- Pumice stone with edges filed..... V, 59
- Parts of—**
- Fishing tackle, unfinished floats not... I, 529
- Musical instruments—**
- Music rolls for player pianos are... V, 164
- Parchment for drumheads..... IV, 84
- Unfinished violin necks, etc..... IV, 438, 470
- Need not always be used with main article..... V, 164
- Periodicals, printed illustrations not free as..... V, 66
- Phonograph, disks are..... IV, 279
- Phonograph, needles are..... V, 498
- Rifles, bayonets are not..... II, 312
- Toys, cloth printed with designs as... V, 483
- Unfinished scissors blades..... V, 485
- Payment, deposit of estimated duty is.... I, 189
- Pearls, imitation, dutiable as beads..... V, 63; 339
- Peas. (*See* Vegetables.)

- | | Volume
and page. | | Volume
and page. |
|--|---------------------|---|---------------------|
| Pencil sharpeners are not machine tools..... | IV, 262 | Post cards: | |
| Penholders, parts of fountain pens not..... | II, 410 | American views defined..... | III, 501 |
| Penknives with letter-opener attachment..... | III, 239 | Embossing defined..... | II, 347 |
| Pens, fountain pens and parts of... II, 410; IV, 100 | | Poultry, dressed, prepared duck meat not.. | I, 16 |
| Perborate of sodium not a borate material.. | II, 212 | Practice established. (<i>See</i> Construction.) | |
| Periodicals, illustrations for are not free as.. | V, 66 | Practice and procedure: | |
| Personal effects: | | Amendments of pleadings permitted.. | IV, 422 |
| Citizenship and residence..... | I, 134 | Assignments of error must be specific.. | IV, 291 |
| Nonresidents, who are... I, 134; IV, 414; V, 341 | | Citation of a case does not move in | |
| Petroleum: | | record in that case..... | III, 468 |
| Countervailing duty on..... | I, 443 | Claim in protest saves defective assign- | |
| Products, insufficient protest.... I, 205; III, 54, | | ments..... | III, 363 |
| Philippine Islands, "direct shipment" | | Claim not assigned, too late if urged on | |
| from..... | I, 450; II, 100 | appeal..... | IV, 298 |
| Phonograph— | | No judgment for lower rate unless im- | |
| Disks are parts of phonographs..... | IV, 279 | porter takes appeal..... | IV, 284 |
| Needles are parts of phonographs..... | V, 498 | Notice of all motions must be given | |
| Pickles: | | (board)..... | III, 251 |
| Limited to vegetables in pickle..... | I, 171, | Objection on ground of noncompliance | |
| Not limited to vegetables in pickle..... | II, 342, | with regulations may be made any | |
| | 408; IV, 261 | time before judgment..... | IV, 60 |
| Pepper pods in brine are..... | II, 342 | Objection to sufficiency in form of pro- | |
| Pictures and frames are classifiable sepa- | | tests comes too late if first raised on | |
| rately..... | V, 222 | appeal..... | IV, 234 |
| Pigment, cadmium sulphide as..... | II, 512 | Objection to sufficiency of affidavits | |
| Pile fabrics, velours with partly pile sur- | | first made on appeal is too late..... | III, 146 |
| fac as..... | III, 301 | Offer to prove when question excluded.. | IV, 313 |
| Pinking machines are not machine tools... III, 435 | | Petitions for review must contain the | |
| Pins: | | names of all the parties..... | IV, 422 |
| Lace, as jewelry..... | IV, 87, 386 | Waiver of application for rehearing. III, 174, IV, | |
| Lace, not jewelry..... | V, 296 | 217 | |
| Metallic, coated with other metal, are | | What is a consent order..... | III, 495 |
| plated..... | III, 204 | Precedents prior decisions not, unless iden- | |
| Pipe cases, empty, are smokers' articles.... | II, 384 | tity of merchandise proved..... | IV, 77 |
| Pipes: | | Precious stones reconstructed rubies as | |
| And tubes distinguished..... | II, 221 | watch jewels..... | V, 336 |
| Clay, so-called meerschaum pipes not.. | IV, 90 | Prepared— | |
| Rubber mouthpieces for, are smokers' | | Meat— | |
| articles..... | IV, 503 | Blood-sausages as similar to..... | III, 399 |
| Plain woven fabrics, damask not... II, 327; II, 382 | | Bones, cured and cooked hams in | |
| Plant packing as manufactures of metal... II, 311 | | tins, are not..... | IV, 64 |
| Plank linoleum. (<i>See</i> Linoleum.) | | Duck meat in tins as..... | I, 16 |
| Plate powder as similar to whiting..... | V, 433, 437 | (<i>See also</i> Fruits; Vegetables.) | |
| Plateaux, straw, as partly made hats..... | II, 99 | Preserved— | |
| Plated pins, pins coated with any metal | | Fish roe, meaning of term..... | I, 1 |
| are..... | III, 204 | For food purposes, caviar in brine is | |
| Plates: | | not..... | I, 1 |
| And sheets distinguished..... | II, 162 | Fruit, meaning of term..... | I, 10 |
| Iron or steel grinders are not..... | I, 22, 29 | Natural flowers, meaning of preserved.. | IV, 446, |
| Steel, drawplates are not..... | II, 4 | 455 | |
| Plating of metal, definitions and distinc- | | (<i>See also</i> Fruit; Vegetables.) | |
| tions..... | V, 506 | Press: | |
| Platinum and nickel wire is not platinum | | Cloth. (<i>See</i> Hair press cloth.) | |
| in wire..... | IV, 398 | Printing, machine for lettering leather | |
| Plums, preserved, as fruits preserved..... | IV, 422 | not..... | III, 348 |
| Plush, hatters', use determines rate of duty | | Presumption that acts of customs officers | |
| on..... | II, 532; IV, 285 | are correct. I, 47, 138, 439; II, 239; III, 447; V, 151 | |
| Polishing— | | (<i>See also</i> Evidence.) | |
| Powder as similar to whiting..... | III, 363 | Printed— | |
| Stones as articles of mineral substance.. | III, 466; | China and earthenware, what is..... | III, 183, |
| | IV, 104 | IV, 359, 403 | |
| Pony skins are fur skins..... | II, 209 | Matter— | |
| Porcelain— | | Die-cut, act of 1909..... | III, 183 |
| Pyrometer tubes..... | IV, 266; V, 393 | Printed toys are not..... | III, 110 |
| Spark plugs—decorative..... | I, 300; V, 547 | Printing— | |
| | | Implies the use of ink..... | III, 348; V, 199 |
| | | Paper is a commercial designation..... | II, 247 |

- Printing—Continued.
- Press—
- Definitions and distinctions..... V, 199
 - Machine for lettering leather not.... III, 348
 - Machine for marking metal tubes not..... V, 199
- Private circulation, advertising matter for. III, 528
- Prizes, articles bestowed as; cases reviewed. IV, 458
- Products, term includes manufactured articles..... V, 366
- Pro forma invoices, entry on, review.... II, 239, 249
- Prohibitory duties—construction which would result in not favored..... II, 399
- Protest: Protests:
- Against parcel-post importations valid IV, 237
 - Burden that is on importer stated..... II, 159
 - Can not be amended after time for filing has expired..... II, 159
 - Claim in upheld though not assigned as error..... III, 363
 - Claiming a higher rate than assessed. III, 24, 495
 - Definition of, and review of legislation on..... V, 264
 - Differing claims may not be joined in one..... V, 264
 - Differing parties may not be joined in one..... V, 264
 - Entitles importer to judgment on merits..... III, 440, 495
 - Extremely liberal construction favored. V, 364
 - Fee, basis of is protest, not entry..... V, 264
 - Filed by mail void unless received in time..... III, 479
 - Filed on Monday void if Sunday be last day..... III, 479
 - Function and office of..... V, 147, 427, 437
 - Held insufficient—
 - Claiming petroleum rate on paraffin I, 205; II, 54
 - Saved by liberal construction..... V, 364
 - Wrong classification, wrong paragraph, right rate..... V, 396
 - Wrong guess on beaded artificial silk articles..... III, 339
 - Wrong paragraph of free list cited. II, 462; III, 232
 - Wrong paragraph, wrong classification, right rate..... V, 427
 - Wrong paragraph, wrong classification, wrong rate..... V, 430
 - Wrong provision of right paragraph III, 309
 - Wrong rate, correct paragraph, no description of merchandise..... II, 221 - Held sufficient, right rate and paragraph, wrong description of goods.. V, 140
 - Importer confined to claims in..... II, 159, 462; III, 350, 375; V, 430
 - Importer must affirmatively establish claim..... V, 393
 - Is beginning of action, not merely notice thereof..... V, 264
 - Lies against all exactions except tonnage dues..... V, 351
 - May cover more than one entry..... V, 264
 - Multifarious claims in, are defective... I, 360
- Protest: Protests—Continued.
- Must direct collector's mind to appropriate provision of law..... I, 205; III, 232; V, 427, 430
 - Must show objection relied on was in mind when filed..... V, 427, 430
 - Pending, reliquidation not permitted.. V, 147
 - Reliquidation giving no new right of.. I, 489
 - Review of statutes governing..... III, 24
 - Satisfied, does not extend time for reliquidation..... II, 140
 - Sufficiency of—
 - Correct paragraphs, no rate specified..... I, 64
 - Liberal construction. I, 64; III, 211; IV, 230
 - Objection to..... V, 224
 - "Or as charged by you"..... IV, 230
 - Use of "etc." in document..... III, 211 - That directs collector to inapplicable provision is insufficient..... I, 205; V, 430
 - Time of filing, last day for being Sunday; cases reviewed..... III, 479
 - Public records, omissions in may be supplied by parole evidence..... V, 351
 - Publications, trade catalogues are not.... V, 443
 - Pulp—
 - Boards as manufactures of pulp..... I, 47
 - Made from cotton rags as manufactures of cotton..... II, 364
 - Wood, country of production..... V, 366 - Pumice stones with filed edges as partly manufactured..... V, 59
 - Pyrometer tubes made of porcelain. IV, 266; V, 393
- Quills, manufactures of—ornamental feathers are not..... II, 112, 290
- Racing shells are not vessels..... II, 526
- Rag pulp not wood pulp by similitude.... II, 364
- Rags, waste bagging free as..... II, 456
- Raincoat material as cloth in part of wool.. III, 161
- Rape meal not free as used only for manure. III, 408
- Rate of duty. (*See Duty.*)
- Rattan, reeds from, cases reviewed..... IV, 522
- Reappraisal:
- Action may be reviewed by Customs Court..... III, 330
 - Allowance for cash discount held question of law..... V, 204
 - Appeal to by collector, method and timeliness..... V, 510
 - Appeals, collector's record of..... V, 351
 - Based on American selling price..... I, 484
 - Board may consider testimony taken in other cases..... V, 317
 - Board not a judicial tribunal..... V, 317
 - Error in judgment does not vitiate.... I, 181, 408, 484; II, 355; III, 5
 - Evidence on, not to be inquired into on appeal..... I, 181, 408, 484; II, 355; III, 5, 152
 - Examination of goods a statutory necessity..... I, 385, 462; II, 149, 355; III, 5, 330; IV, 308, 404; V, 290
 - Finality of in absence of fraud or illegality..... I, 181, 408, 484; II, 355; III, 330; V, 121, 317

| | Volume and page. | | Volume and page. |
|---|---|---|---|
| Reappraisement—Continued. | | Reliquidation—Continued. | |
| Illegal if board does not examine statu- tory percentage of goods..... | I, 385, 462; II, 149, 355; III, 5 | under board decision—protests against..... | I, 489; V, 144 V, 147 |
| Illegal if goods not examined..... | III, 330; IV, 308, 404 | void while a protest is pending..... | IV, 217, 262, 266, 284, 313; V, 40, 311, 319 |
| Invalid—appraised value prevails..... | V, 290 | Remanding for new trial, appropriate rea- sons for..... | IV, 217, 262, 266, 284, 313; V, 40, 311, 319 |
| Legal, though evidence not considered..... | I, 408 | Remedy in case of goods destroyed on voy- age..... | IV, 247 |
| Liquidation pending is void..... | V, 351 | Res adjudicata, as to point not argued or noticed..... | II, 192; III, 83, 130 |
| Machinery delivered to importer..... | III, 330 | Residence, married woman's, how deter- mined..... | IV, 414 |
| Mixed wools, court will not review evi- dence..... | II, 355 | Revenue laws, Government has right to prescribe conditions of appeals under..... | I, 181 |
| Not illegal, if any evidence supports finding..... | I, 408 | Revised statutes: | |
| Records not part of record in protest proceedings..... | I, 203 | Section 3..... | II, 526 |
| R. S. 2901 held mandatory on..... | I, 385, 462; II, 149, 355; III, 5 | Section 251..... | I, 63, 71 |
| samples on— | | Section 863..... | I, 277 |
| necessity and sufficiency of..... | I, 462; II, 149, 355; III, 5, 330 | Section 1707..... | III, 16 |
| waiver by importer..... | II, 355; III, 5; IV, 308, 404; V, 290 | Section 2505..... | III, 319 |
| Reciprocity agreements: | | Section 2614..... | I, 386 |
| country of exportation, what is..... | I, 404 | Section 2652..... | III, 456 |
| favorable-nation clause..... | I, 426 | Section 2776..... | III, 105 |
| Reconstructed rubies as watch jewels..... | V, 336 | Section 2801..... | II, 156 |
| Recovered rubber not manufactures of rub- ber..... | I, 518 | Section 2808..... | V, 128 |
| Reeds, unmanufactured, review of cases.... | IV, 522 | Section 2899..... | I, 109, 389, 392; IV, 120 |
| Regulations: | | Section 2901..... | I, 109, 389, 392; II, 153, 281, 355 |
| American goods returned as scrap..... | III, 394 | Section 2904..... | I, 291 |
| antiques imported as baggage subject to..... | III, 384 | Section 2921..... | II, 334; III, 122 |
| apply to goods in bonded warehouse.... | III, 137 | Section 2926..... | III, 450 |
| compliance with, can not be waived by collector..... | IV, 60 | Section 2930..... | I, 386 |
| compliance with, condition precedent.... | I, 290; II, 537; III, 137, 146; IV, 60 | Section 2939..... | II, 355 |
| compliance with, not alone sufficient in case of antiquities..... | III, 142 | Section 2965..... | IV, 363; V, 308 |
| general, binding on all parties..... | III, 69 | Section 2983..... | II, 333 |
| invalid that assume to alter statute.... | I, 61; III, 198; V, 377 | Rhodium as a metal unwrought..... | I, 158 |
| not authorized by statute invalid.... | IV, 247, 253 | Ribbon wire as an article made from wire..... | IV, 420 |
| rehearing by Customs Court..... | I, 320; IV, 291 | Ribbons, chiffon, as manufactures of silk.... | II, 515 |
| rehearing, motion for, extends time for appeal..... | II, 434 | Rice, broken and whole, may be segregated for duty..... | I, 362 |
| Reliquidation: | | Rifles, parts of—bayonets..... | II, 312 |
| after a year— | | Right to import at any particular rate of duty, none exists..... | II, 22 |
| cases reviewed..... | V, 151 | Rock crystal is a colorless quartz..... | V, 416 |
| fraud in return of weight..... | V, 151 | Rockingham earthenware defined and described..... | III, 420 |
| fraud in stating packing charges..... | V, 2 | Rosa rugosa not classifiable as briar rose.... | III, 354 |
| illegal if protest is satisfied..... | II, 140 | Roses, briar, rosa rugosa seedlings not.... | III, 354 |
| jurisdiction of collector..... | V, 151 | Rosin held to be crude gum resin.. | II, 485; III, 440 |
| as to currency valuation, no limitation in time..... | V, 147 | Rotten fruit: | |
| carries presumption of legality..... | V, 151 | delay in examination of, defeats im- porter's claim..... | II, 334 |
| giving no new right of protest..... | I, 489 | grapes dutiable according to capacity of barrel..... | III, 265 |
| legal though goods not present..... | III, 456 | no allowance for goods delivered to importer and then seized by board of health..... | III, 209 |
| legal within one year of entry..... | III, 456 | time and mode of proof prescribed.... | III, 198 |
| must accord with board's decision.. | V, 144, 315 | Rough leather. (See Leather.) | |
| satisfied protest does not extend time for..... | II, 140 | Rubber: | |
| | | recovered, not a manufacture..... | I, 518 |
| | | scrap, new, held to be crude rubber.... | IV, 443 |
| | | Russian cords not figured cotton cloth.... | I, 73 |

- | | Volume
and page. | | Volume
and page |
|---|---------------------|--|-------------------------------------|
| ■ addlery, definition and scope of term..... | II, 46 | Segregation of goods indiscriminately | |
| St. Johns Bread, definition of..... | IV, 392 | mixed..... | I, 316, 353, 362; III, 180, 325 |
| Bake: | | Selvage as an immaterial feature of cloth.... | I, 223; |
| Allowance for leakage (1897)..... | II, 305 | | III, 236 |
| Allowance for leakage, none under act | | Shears, hair clippers are not..... | II, 109 |
| of 1909..... | II, 371 | Sheepskin rugs as manufactures of fur- | |
| Sample— | | material..... | II, 167 |
| Book showing results of dyeing are not | | Sheepskins: | |
| samples..... | IV, 374 | Australian, free as fur skins..... | I, 272 |
| Cards showing dress goods are not sam- | | With wool on, lamb skins are not..... | V, 178 |
| ples..... | IV, 387 | Sheets, definition of term..... | III, 475; IV, 245 |
| Samples: | | Shelled— | |
| Adequate and inadequate. I, 362; II, 456; III, 52 | | Almonds, all are "clear"..... | II, 399, 444, 450 |
| Burden of retaining on Government. I, 178, 362; | | Walnuts, walnut pieces as..... | II, 457 |
| II, 456; III, 219; V, 36 | | Shells: | |
| In reappraisements necessity and suffi- | | Cut and bored, are advanced in value.. | III, 504 |
| ciency of.. I, 285, 462; II, 149, 355; IV, 308, 404 | | Racing. (See Vessels.) | |
| No authority in law for free entry of. IV, 374, 387 | | Shipment, direct, meaning of term... I, 450; II, 100 | |
| Not necessary in classification cases.... | II, 405 | Shoes, embroidered, as embroidered wear- | |
| Band, definitions of..... | I, 506; IV, 327 | ing apparel..... | I, 5 |
| Sapphire bearings for electric instruments. IV, 287 | | Shooks, American, boxes and barrels made | |
| Sapphires are precious stones..... | IV, 287 | from, are wholly free..... | IV, 91 |
| Saturday afternoon a legal holiday in New | | Shortage: | |
| York..... | III, 479 | Caused by theft before importation.... | III, 120 |
| Sausages, blood, as similar to prepared | | Not allowed for if goods have left cus- | |
| meat..... | III, 399 | toms custody..... | II, 189; IV, 102; V, 173 |
| Scalloped articles not embroidered articles. II, 477; | | Requisites of proof..... | II, 189; IV, 102; V, 173 |
| | III, 263 | Shrinkage charges on woolen cloths not du- | |
| Schappe silk yarn, conditioned weight gov- | | table..... | V, 432 |
| erns..... | II, 227 | Side arms, bayonets as..... | II, 312 |
| Scientific apparatus, tank containing acids | | Silk— | |
| free as..... | II, 440 | And cotton pongee, cotton chief value. | I, 132 |
| Scissors: | | Artificial. (See Artificial silk.) | |
| Hair clippers are not..... | II, 109 | Fabrics appliquéd, minimum rate on.. | I, 297 |
| Unfinished blades for, as parts of..... | V, 485 | Fabrics, meaning of "boiled off"..... | I, 346 |
| Scrap— | | Goods, appliquéd or embroidered, pro- | |
| Iron as American goods returned..... | III, 394 | viso..... | III, 401 |
| Iron, classification of, under act of | | Goods, weighing by appraising officers. IV, 447 | |
| 1909..... | III, 180, 325 | Mufflers, provision for, includes knitted | |
| Iron from Cuba not product of Cuban | | mufflers..... | IV, 38, 486; V, 552 |
| industry..... | IV, 494 | Weight of, official returns of..... | I, 439; III, 447 |
| Rubber, new, held to be crude rubber. IV, 443 | | Woven fabrics means broad silks..... | II, 515; |
| Steel fit only for remelting..... | II, 159 | | III, 315 |
| Screens— | | Yarn, schappe, dutiable number of.... | II, 227 |
| Are not furniture..... | II, 181 | Yarn, spun, on beams..... | III, 62; V, 1, 47 |
| Of wood, silk embroidered screens not. III, 488 | | Silver— | |
| Of wood, splash mats as..... | II, 390 | Mesh bags, act of 1909..... | III, 117 |
| Sculptures: | | Sweepings mixed with sawdust are free. | V, 62 |
| Alabaster pedestals not..... | II, 508 | Similar, tool outfit not similar to a traveling | |
| And statuary interchangeable terms... III, 168 | | set..... | II, 393 |
| Carved marble columns held to be..... | IV, 389 | Similitude: | |
| Definitions and limitations..... | III, 124, 298 | Balata belting as india-rubber belting.. | I, 252 |
| Marble mantels are not..... | III, 298, 473 | Cattle hair as wool..... | II, 389 |
| Marble panels are not..... | III, 461 | Cellulose and pyroxylin..... | V, 229 |
| Monument and pedestal as..... | IV, 508 | Clause, application and scope of..... | I, 93; |
| Vases, jardinières, etc., as..... | II, 321; | | II, 203, 368; III, 57, 87, 128, 229 |
| | III, 124; V, 191 | Clause applies unless express language | |
| Secretary of the Treasury, jurisdiction of.. | III, 309 | of exclusion used..... | V, 423 |
| Seed, celery, as an aromatic, not garden seed | II, 353 | Degree of similarity discussed..... | III, 87, 67 |
| Seedlings, rosa rugosa held not to be..... | III, 354 | Dyed grasses as grains and leaves..... | V, 85 |
| Seeds— | | Eggs yolks and whites mixed as similar | |
| And vegetables distinguished..... | II, 388 | to eggs..... | III, 178 |
| May include pith and seeds..... | IV, 392 | Excludes identity..... | I, 93; II, 368; V, 229 |
| Seger cones as articles of earthy substance. IV, 478 | | Goose skins as fur skins..... | I, 321 |

- Volume and page.
- Volume and page.
- Similitude—Continued.
- Ground corundum as ground emery... I, 506
- In use, need not be identical in method... II, 389;
- III, 128; V, 229
- None between a liquid and a solid... IV, 129
- Polishing powder as whitening... III, 363
- Relative specificity of contrasting provisions not relevant... III, 57, 87
- Sausages containing no meat as prepared meat... III, 399
- To vegetables, an untenable claim... IV, 129
- Viscose caps for glass tubes not as bottle caps of metal... V, 423
- Skins, pointed fox skins are manufactures of fur... II, 267
- Slides for toy magic lanterns as parts of toys... I, 370
- Slippers, cotton and leather, rule for ascertaining values... II, 143
- Smokers' articles:
- Automatic lighters may be... II, 439; IV, 36
- Broad scope of provision... I, 334
- Fancy boxes as... I, 194
- Metal boxes for cigarettes are... I, 334
- More specific than leather cases... I, 377; II, 384
- Partly finished mouthpieces as... IV, 503
- Snails not classifiable as shellfish... V, 124
- Soap:
- Fluid soap as soap... III, 358
- Pears' unsented, as a fancy soap... I, 500
- Sodium perborate not a borate material... II, 212
- Solution, chemical definitions of... V, 226
- Soup tablets as vegetables prepared... V, 32
- Spark plugs as porcelain ware... I, 300;
- III, 193; V, 547
- Specific duty goods rate fixed upon basis of usual coverings... IV, 349, 355; V, 47
- Spectacles, lenses for, are not parts of... II, 9
- Splash mats as screens... III, 390
- Split leather, definition of... II, 270
- Spools containing silk yarn, dutiable status of... III, 62, 204, 209
- Spun silk yarn:
- Size No. fixes rate of duty... V, 140
- On beams... III, 62; V, 47
- Stamped steel shapes for enameling... II, 1
- Steam engines, rock drills run by air are not... V, 481
- Steel—
- Plates and sheets distinguished... II, 162
- Plates, grinding parts for mills are not... I, 22
- Rails, scrap, fit only for remelting... II, 159
- Stamped shapes manufactures of steel... II, 1
- Strips, cold-rolled, act of 1909... III, 184
- Strips, nickel-coated, not dutiable as steel strips... IV, 82
- Strips, not wire rods... I, 494
- Structural shapes, pressed shapes are not... V, 175
- Stone:
- Articles as articles of mineral substance... II, 425; V, 188
- Building, must show adaptability for use in building... III, 72, 486
- Stones for grinding colors are not grindstones... III, 67
- Stones, glazing and polishing, as articles of mineral substance... II, 425; III, 406; IV, 104
- Stoneware and metal exhausters... II, 436
- Straw—
- Hats, trimmed, specific provision for... IV, 322
- Plateaux as partly manufactured hats... II, 89
- Strings for musical instruments; requisites of... III, 306; V, 301
- Structural shapes:
- Advanced beyond rolling... V, 175, 474
- Pressed shapes not classed as... V, 175
- Sugar:
- Bounty, authority of Assistant Secretary... I, 242
- Bounty paid, dutiable on weight as imported... II, 116
- Bounty, Treasury finding as to amount of, conclusive... I, 242
- Dutiable weight is landed weight... II, 116
- Tare, regulations must be followed... III, 69
- Test, polariscopic test binding on Government as well as importers... I, 228
- Sulphur, naturally refined, not free as crude... IV, 134
- Sunday counted within time for filing protests... III, 479
- Sweetmeats, definition of... I, 113, 144
- Talc:
- Powdered, as a nonenumerated manufactured article... II, 92
- Sawed, not synonymous with French chalk... III, 522
- Tallow, vegetable, chemically compounded... IV, 81
- Tamarinds packed in molasses are free... II, 380
- Tanks or vessels, restricted meaning of terms... IV, 132
- Tape:
- As belting for machinery... I, 142
- Cotton, a specific provision... I, 374;
- III, 378; IV, 95
- Cotton, for coat hangers, held not tape... V, 110
- Tapers—definition and limitation of term... III, 128
- Tapestries, cotton, as upholstery goods... III, 115
- Tare:
- Definition and discussion of... I, 316;
- II, 338; III, 171
- Dirt on hides described as... I, 316
- Garlic tops not allowable as... III, 171
- Liquid in canned fish not allowed as... IV, 401
- Liquid in canned vegetables not allowed as... V, 167
- Must be ascertained in accordance with customs regulations... III, 69
- Ordinary amount of impurities not... II, 338
- (See also Allowance.)
- Tariff act of 1897:
- Paragraph 3... I, 166, 213, 513; II, 165, 212
- Section 6... I, 104,
- 171, 280, 437; II, 462, 505; III, 72, 522
- Section 7... II, 39
- Paragraph 17... I, 51
- Paragraph 20... II, 374
- Paragraph 32... I, 360
- Paragraph 45... I, 104

| Tariff act of 1897—Continued. | Volume and page. |
|-------------------------------|--|
| Paragraph 52..... | I, 19 |
| Paragraph 54..... | I, 32 |
| Paragraph 58..... | I, 19; II, 512; III, 83 |
| Paragraph 67..... | I, 146; II, 59 |
| Paragraph 68..... | II, 59 |
| Paragraph 69..... | I, 500 |
| Paragraph 88..... | V, 66 |
| Paragraph 96..... | I, 194, 300; II, 436 |
| Paragraph 100..... | I, 34, 194 |
| Paragraph 101..... | II, 9 |
| Paragraph 107..... | II, 9 |
| Paragraph 108..... | II, 9 |
| Paragraph 109..... | II, 9 |
| Paragraph 114..... | I, 25 |
| Paragraph 115..... | I, 293 |
| Paragraph 117..... | I, 25 |
| Paragraph 118..... | I, 510; III, 72 |
| Paragraph 126..... | II, 162 |
| Paragraph 127..... | I, 550; II, 4 |
| Paragraph 131..... | I, 115; II, 162 |
| Paragraph 132..... | I, 115 |
| Paragraph 135..... | I, 22, 494; II, 2, 4 |
| Paragraph 148..... | I, 29 |
| Paragraph 154..... | II, 312 |
| Paragraph 155..... | I, 255 |
| Paragraph 188..... | III, 204 |
| Paragraph 193..... | I, 22, 29, 109, 115, 337, 550; II, 2, 162, 436; III, 205; V, 82 |
| Paragraph 208..... | I, 535 |
| Paragraph 209..... | II, 16 |
| Paragraph 241..... | I, 17, 171, 237 |
| Paragraph 251..... | V, 85 |
| Paragraph 257..... | I, 14 |
| Paragraph 261..... | I, 341 |
| Paragraph 262..... | I, 10 |
| Paragraph 263..... | I, 10, 113, 144, 239, 287, 328; IV, 247 |
| Paragraph 269..... | II, 399 |
| Paragraph 275..... | I, 16; III, 399 |
| Paragraph 296..... | II, 305; III, 120 |
| Paragraph 306..... | I, 223; II, 215 |
| Paragraph 314..... | I, 49; V, 106 |
| Paragraph 320..... | I, 49, 252; III, 470 |
| Paragraph 337..... | I, 101 |
| Paragraph 339..... | I, 168; III, 401; V, 230 |
| Paragraph 346..... | III, 263 |
| Paragraph 351..... | III, 5 |
| Paragraph 358..... | III, 5 |
| Paragraph 359..... | III, 5 |
| Paragraph 360..... | I, 272 |
| Paragraph 370..... | I, 170 |
| Paragraph 386..... | I, 439 |
| Paragraph 387..... | I, 347 |
| Paragraph 390..... | I, 5, 92, 168; II, 43, 181; III, 58; V, 104 |
| Paragraph 391..... | I, 92, 178 |
| Paragraph 396..... | II, 237, 247 |
| Paragraph 397..... | II, 78 |
| Paragraph 398..... | I, 434 |
| Paragraph 400..... | I, 82, 434; II, 197 |
| Paragraph 401..... | II, 237 |
| Paragraph 402..... | I, 47; II, 55, 247 |
| Paragraph 403..... | I, 51, 82, 423 |
| Paragraph 407..... | I, 47, 422 |
| Paragraph 409..... | I, 89; III, 229; V, 105 |

| Tariff act of 1897—Continued. | Volume and page. |
|----------------------------------|---|
| Paragraph 415..... | I, 353 |
| Paragraph 418..... | I, 109 |
| Paragraph 419..... | I, 506 |
| Paragraph 425..... | I, 321, 337; II, 39, 234, 428; V, 82 |
| Paragraph 426..... | I, 321 |
| Paragraph 427..... | II, 101 |
| Paragraph 434..... | II, 11 |
| Paragraph 437..... | I, 336 |
| Paragraph 438..... | I, 5 |
| Paragraph 443..... | I, 279 |
| Paragraph 445..... | III, 321 |
| Paragraph 449..... | I, 252, 535; II, 90 |
| Paragraph 450..... | II, 410 |
| Paragraph 454, section 3..... | I, 293; III, 226 |
| Paragraph 459..... | I, 334, 497 |
| Paragraph 462..... | III, 401; IV, 9 |
| Paragraph 482..... | II, 165, 522 |
| Paragraph 483..... | II, 22; III, 1 |
| Paragraph 489..... | I, 90 |
| Paragraph 549..... | I, 1 |
| Paragraph 562..... | I, 272 |
| Paragraph 568..... | I, 122 |
| Paragraph 579..... | I, 518 |
| Paragraph 614..... | I, 280 |
| Paragraph 626..... | I, 126 263, 443; II, 275, 465; III, 54 |
| Paragraph 635..... | III, 504 |
| Tariff act of 1909: | |
| Effective when..... | I, 415 |
| Office hours..... | I, 415 |
| Paragraph 2..... | III, 375 |
| Paragraph 3..... | II, 57, 212, 285; III, 9, 375; IV, 109 |
| Section 5..... | I, 450; II, 100 |
| Paragraph 15..... | IV, 113 |
| Section 17..... | I, 118 |
| Paragraph 23..... | III, 475 |
| Subsection 1 of section 28..... | III, 30 |
| Subsection 7 of section 28..... | IV, 223, 264; V, 44, 53 |
| Subsection 12 of section 28..... | V, 270 |
| Subsection 13 of section 28..... | IV, 308 |
| Subsection 14 of section 28..... | V, 148, 373 |
| Subsection 18 of section 28..... | IV, 54, 122; V, 432 |
| Subsection 22 of section 28..... | III, 164, 198, 209; IV, 51, 116, 247, 253; V, 74 |
| Subsection 23 of section 28..... | V, 54 |
| Section 28, subsection 18..... | I, 309; II, 37, 61, 299; III, 63 |
| Section 28, subsection 29..... | II, 434; III, 12 |
| Section 29..... | I, 108, 190 |
| Paragraph 15..... | V, 226 |
| Paragraph 20..... | II, 485; IV, 109, 325 |
| Paragraph 25..... | IV, 510 |
| Paragraph 32..... | IV, 452 |
| Paragraph 37..... | II, 483, 526 |
| Paragraph 38..... | IV, 139, 140, 358; V, 322, 377 |
| Paragraph 41..... | V, 347 |
| Paragraph 54..... | III, 363 |
| Paragraph 56..... | III, 387 |
| Paragraph 65..... | III, 515 |
| Paragraph 67..... | V, 319 |
| Paragraph 69..... | III, 356 |
| Paragraph 88..... | IV, 54 |
| Paragraph 89..... | V, 59 |
| Paragraph 90..... | I, 400; IV, 15 |
| Paragraph 91..... | I, 257 |

| Tariff act of 1909—Continued. | Volume and page. |
|-------------------------------|---|
| Paragraph 92..... | V, 76 |
| Paragraph 93..... | II, 85; III, 193, 420; IV, 359; V, 76 |
| Paragraph 94..... | III, 193; IV, 462; V, 147 |
| Paragraph 95..... | II, 92, 368, 425; III, 220, 406; IV, 5, 110, 284, 287; V, 63, 188, 393, 416 |
| Paragraph 97..... | III, 245; IV, 26 |
| Paragraph 98..... | II, 411; IV, 26; V, 56, 299, 401, 528 |
| Paragraph 99..... | IV, 21 |
| Paragraph 103..... | V, 528 |
| Paragraph 104..... | IV, 21; V, 528 |
| Paragraph 106..... | IV, 21 |
| Paragraph 107..... | I, 370 |
| Paragraph 109..... | I, 457; II, 283; III, 224, 509; V, 57, 244, 489 |
| Paragraph 111..... | II, 70 |
| Paragraph 112..... | II, 308; III, 98, 461, 473; V, 191 |
| Paragraph 114..... | III, 67, 68, 486 |
| Paragraph 115..... | III, 68 |
| Paragraph 118..... | II, 159; III, 180, 187 |
| Paragraph 121..... | V, 175, 475 |
| Paragraph 123..... | II, 350 |
| Paragraph 126..... | II, 159 |
| Paragraph 131..... | V, 175 |
| Paragraph 135..... | II, 184, 459; IV, 396, 420; V, 43 |
| Paragraph 147..... | IV, 304; V, 362, 410 |
| Paragraph 149..... | II, 451; IV, 281 |
| Paragraph 151..... | I, 152; II, 30, 57, 221; III, 94, 234 |
| Paragraph 152..... | II, 296; III, 239; V, 485 |
| Paragraph 153..... | II, 312 |
| Paragraph 158..... | II, 451 |
| Paragraph 162..... | III, 77 |
| Paragraph 172..... | IV, 245 |
| Paragraph 175..... | V, 33 |
| Paragraph 181..... | I, 472; V, 399 |
| Paragraph 183..... | III, 187 |
| Paragraph 187..... | IV, 100 |
| Paragraph 191..... | II, 231 |
| Paragraph 192..... | IV, 105 |
| Paragraph 193..... | I, 472 |
| Paragraph 195..... | I, 309; II, 299; IV, 242 |
| Paragraph 196..... | V, 423 |
| Paragraph 197..... | I, 226; III, 436; V, 199, 491, 534 |
| Paragraph 199..... | II, 109, 137, 311, 329, 393, 439, 475; III, 348, 361, 408, 410, 419, 429, 435, 509, 520; IV, 83, 105, 132, 245, 292; V, 61, 199, 382, 410, 418, 474, 481 |
| Paragraph 200..... | V, 114 |
| Paragraph 201..... | II, 123; IV, 449; V, 102 |
| Paragraph 203..... | IV, 480 |
| Paragraph 204..... | IV, 431 |
| Paragraph 212..... | II, 15 |
| Paragraph 214..... | II, 15, 17, 37, 419; III, 390, 488; IV, 496 |
| Paragraph 215..... | II, 68, 526; III, 146; IV, 330, 349; V, 1, 164, 396 |
| Paragraph 229..... | V, 135 |
| Paragraph 242..... | V, 465, 472 |
| Paragraph 251..... | II, 274; V, 167 |
| Paragraph 252..... | II, 342; IV, 75, 261; V, 32 |
| Paragraph 253..... | II, 342, 408 |
| Paragraph 256..... | I, 138; III, 179 |
| Paragraph 263..... | II, 26; V, 85 |
| Paragraph 264..... | III, 354 |
| Paragraph 266..... | II, 338 |

| Tariff act of 1909—Continued. | Volume and page. |
|-------------------------------|--|
| Paragraph 270..... | II, 95, 471; IV, 70; V, 40, 256, 388, 566 |
| Paragraph 272..... | I, 304; II, 471; IV, 70, 471; V, 41, 256 |
| Paragraph 273..... | IV, 70; V, 556 |
| Paragraph 274..... | III, 19, 230, 247; IV, 422; V, 89, 159, 371 |
| Paragraph 275..... | II, 317; IV, 228 |
| Paragraph 276..... | III, 265 |
| Paragraph 280..... | II, 399, 444 |
| Paragraph 281..... | II, 457 |
| Paragraph 283..... | II, 444; V, 516 |
| Paragraph 284..... | IV, 64 |
| Paragraph 286..... | III, 399 |
| Paragraph 290..... | III, 316 |
| Paragraph 307..... | II, 340, 371; III, 176 |
| Paragraph 308..... | III, 291 |
| Paragraph 309..... | IV, 505 |
| Paragraph 312..... | V, 244 |
| Paragraph 313..... | II, 222 |
| Paragraph 315..... | I, 556 |
| Paragraph 316..... | III, 240 |
| Paragraph 318..... | I, 73 |
| Paragraph 320..... | I, 73, 556; III, 113, 191, 237, 240 |
| Paragraph 321..... | I, 356; II, 479 |
| Paragraph 323..... | I, 73; III, 237, 240 |
| Paragraph 324..... | II, 143; V, 171, 218, 484 |
| Paragraph 325..... | V, 216 |
| Paragraph 326..... | III, 115 |
| Paragraph 328..... | III, 368; V, 441 |
| Paragraph 330..... | I, 142; III, 91; IV, 394 |
| Paragraph 332..... | III, 112, 191, 378; IV, 77, 430; V, 110 |
| Paragraph 347..... | IV, 227; V, 215 |
| Paragraph 349..... | I, 142, 374; II, 125, 477; III, 112, 216, 401; IV, 77; V, 170, 208, 218, 246, 273, 357 |
| Paragraph 350..... | II, 519; V, 247 |
| Paragraph 355..... | III, 25, 495; V, 183 |
| Paragraph 357..... | III, 382 |
| Paragraph 358..... | II, 327; III, 25; V, 184 |
| Paragraph 370..... | V, 52 |
| Paragraph 378..... | II, 481; III, 161 |
| Paragraph 380..... | II, 481 |
| Paragraph 382..... | II, 390; IV, 298; V, 261 |
| Paragraph 397..... | II, 227; V, 47 |
| Paragraph 399..... | I, 297; III, 214, 301; IV, 285 |
| Paragraph 400..... | IV, 38, 486; V, 552 |
| Paragraph 402..... | I, 297; III, 401, 488; IV, 3; V, 534 |
| Paragraph 403..... | II, 325, 515; III, 214, 459 |
| Paragraph 405..... | II, 395; III, 75, 87, 333 |
| Paragraph 406..... | IV, 271 |
| Paragraph 410..... | II, 236 |
| Paragraph 411..... | I, 120; II, 62, 65, 302; III, 370; IV, 11, 29, 240, 411; V, 66 |
| Paragraph 412..... | II, 347, 422; III, 341, 501; IV, 1, 94, 234; V, 385 |
| Paragraph 415..... | II, 65, 225, 396; III, 183; IV, 29, 240 |
| Paragraph 416..... | IV, 42, 374; V, 164 |
| Paragraph 418..... | II, 62 |
| Paragraph 420..... | V, 164 |
| Paragraph 421..... | II, 314; III, 333, 509; V, 93, 202, 294, 340, 459 |
| Paragraph 422..... | III, 87; IV, 322 |

| Tariff act of 1909—Continued. | Volume and page. |
|-------------------------------|---|
| Paragraph 423..... | IV, 37, 331 |
| Paragraph 426..... | III, 430 |
| Paragraph 427..... | V, 304, 327, 459 |
| Paragraph 429..... | I, 529 |
| Paragraph 431..... | II, 386; III, 102, 111; V, 208, 484 |
| Paragraph 432..... | V, 490 |
| Paragraph 436..... | III, 128; IV, 66, 293; V, 78 |
| Paragraph 438..... | II, 112, 290, 325; III, 260; IV, 446, 455; V, 124 |
| Paragraph 439..... | II, 167, 172, 177, 202, 267; IV, 332 |
| Paragraph 442..... | V, 198 |
| Paragraph 448..... | III, 117, 273, 276, 282, 286, 288, 327, 502; IV, 87, 378, 386; V, 294, 296, 470 |
| Paragraph 449..... | III, 502; V, 193, 337, 339 |
| Paragraph 450..... | I, 545; II, 46, 129, 270; IV, 58 |
| Paragraph 451..... | I, 379, 537, 545; II, 80, 129, 270; III, 97, 353, 356, 373, 377, 442, 444, 463, 468; IV, 57; V, 91, 117, 125, 213 |
| Paragraph 452..... | I, 377; II, 393, 405; III, 444; IV, 49, 252, 274; V, 249, 311 |
| Paragraph 459..... | II, 105; IV, 338; V, 413, 477 |
| Paragraph 460..... | V, 144 |
| Paragraph 461..... | II, 46 |
| Paragraph 462..... | IV, 384, 506; V, 320, 421 |
| Paragraph 463..... | II, 32, 112, 201; IV, 344; V, 87, 396 |
| Paragraph 464..... | II, 410; IV, 100 |
| Paragraph 467..... | III, 306; IV, 84, 470; V, 164, 302 |
| Paragraph 468..... | IV, 279; V, 498 |
| Paragraph 469..... | II, 290 |
| Paragraph 470..... | II, 321, 508; III, 124, 108, 299, 473; IV, 399, 508; V, 191, 222, 252 |
| Paragraph 475..... | I, 377; II, 384; IV, 36, 503 |
| Paragraph 477..... | II, 532; IV, 285 |
| Paragraph 478..... | III, 102, 4, 1 |
| Paragraph 479..... | V, 36, 62, 102, 404, 490 |
| Paragraph 480..... | II, 92, 177, 285, 361, 388; III, 128, 221, 316, 406, 498, 522; IV, 5, 81, 129, 336; V, 87, 95, 100, 134, 184, 196, 444, 491 |
| Paragraph 481..... | I, 120; II, 203, 390; III, 180; IV, 467; V, 423, 459 |
| Paragraph 482..... | V, 197 |
| Paragraph 499..... | II, 522 |
| Paragraph 500..... | II, 23; III, 394; IV, 91, 500; V, 364 |
| Paragraph 517..... | V, 443, 523 |
| Paragraph 519..... | III, 528 |
| Paragraph 536..... | IV, 268 |
| Paragraph 540..... | V, 210 |
| Paragraph 544..... | V, 399 |
| Paragraph 547..... | V, 404 |
| Paragraph 548..... | I, 246 |
| Paragraph 559..... | II, 353, 374; IV, 98 |
| Paragraph 560..... | V, 389 |
| Paragraph 567..... | I, 515; V, 130 |
| Paragraph 571..... | V, 159 |
| Paragraph 578..... | III, 260; IV, 260 |
| Paragraph 590..... | IV, 81; V, 29 |
| Paragraph 593..... | V, 500 |
| Paragraph 594..... | II, 292 |
| Paragraph 624..... | III, 400; IV, 490 |
| Paragraph 626..... | V, 183 |
| Paragraph 630..... | III, 260; IV, 142, 145, 260; V, 57, 95 |
| Paragraph 634..... | V, 67 |
| Paragraph 639..... | V, 130 |
| Paragraph 643..... | V, 62 |
| Paragraph 644..... | III, 232 |

| Tariff act of 1909—Continued. | Volume and page. |
|--|---|
| Paragraph 650..... | II, 440 |
| Paragraph 653..... | IV, 399 |
| Paragraph 668..... | IV, 392 |
| Paragraph 676..... | V, 178 |
| Paragraph 683..... | IV, 327 |
| Paragraph 707..... | III, 137, 142, 146, 309 |
| Paragraph 709..... | I, 134; IV, 414 |
| Paragraph 712..... | V, 79, 114 |
| Paragraph 713..... | IV, 522 |
| Paragraph 715..... | V, 252 |
| Paragraph 716..... | V, 252 |
| Paragraph 717..... | IV, 60, 137, 142, 146, 309, 474; V, 222 |
| Tariff act of 1913: | |
| Paragraph N, section 3..... | V, 264 |
| Paragraph 143..... | V, 514 |
| Paragraph 167..... | V, 506, 514 |
| Paragraph 194..... | V, 532 |
| Paragraph 216..... | V, 527 |
| Paragraph 627..... | V, 453 |
| Paragraph 642..... | V, 341 |
| Paragraph 647..... | V, 541 |
| Tea— | |
| Coverings; legislation and litigation reviewed..... | V, 453 |
| Package, what containers are dutiable..... | V, 453 |
| Technical terms may be proved by witnesses..... | |
| Telephone poles, characteristics of..... | IV, 431 |
| Temporary sewing held a manufacture..... | II, 167, 172 |
| Tender is unnecessary when it would be useless..... | V, 130 |
| Terrazo as a nonenumerated manufactured article..... | I, 280 |
| Tetrachloride of tin as lac spirits..... | II, 192 |
| Thermos bottles not classified as glass bottles, but as blown glassware..... | IV, 26 |
| Thymol, alcoholic medicinal preparation..... | III, 10 |
| Timber, definition and scope of term..... | V, 79 |
| Time— | |
| Limit for appeals. (See Appeals.) | |
| Of effect, goods under customs examination..... | I, 189, 293 |
| Of filing, meaning of term..... | III, 137, 479 |
| Tin tetrachloride as lac spirits..... | II, 192 |
| Tissue paper fans as manufacture of tissue paper..... | II, 236 |
| Tomato paste as vegetables prepared..... | IV, 75 |
| Tools, machine. (See Machine tools.) | |
| Toys: | |
| A specific enumeration; cases reviewed..... | III, 102, 110 |
| Articles used in kindergarten..... | V, 208 |
| Articles suitable only for amusement of children..... | I, 109; IV, 9, 37 |
| Artificial shamrocks are not..... | II, 325 |
| Bracelets worn by children are not..... | V, 202 |
| Celluloid buttonnieres are not..... | II, 234 |
| Cheapness does not determine classification as..... | V, 202, 294 |
| Children's embroidery sets as..... | V, 208 |
| Children's jewelry not..... | V, 294 |
| Definition and limitation of..... | I, 109; II, 386; III, 110 |
| Feather dusters such as "ticklers" are not..... | IV, 37 |

| | Volume and page. |
|--|---------------------|
| Toys—Continued. | |
| Fireworks not..... | I, 109 |
| Kindergarten, articles used in, as toys.. | V, 208 |
| Parasols may be, though specifically enumerated..... | III, 102; IV, 9 |
| Parts of, cloth printed with designs as.. | V, 483 |
| Parts of slides for toy magic lanterns as.. | I, 370 |
| Teddy-bear muffs held to be..... | II, 386 |
| Trade custom, not actual measurements, governs..... | II, 76, 227 |
| Trade-mark treated as a decoration..... | III, 193; |
| | IV, 359, 403 |
| Tragasol gum as a crude article..... | II, 462, 522 |
| Transfer paper. (See Paper.) | |
| Traveling and similar sets: | |
| Automobilists' tool outfit not..... | II, 393 |
| Cases fitted with writing implements are..... | V, 249 |
| Manicure sets may be..... | IV, 49 |
| Toilet sets are..... | IV, 274 |
| Treasury decisions cited in opinions: | |
| 480..... | IV, 284 |
| 604..... | I, 356 |
| 667..... | I, 356 |
| 1667..... | II, 415 |
| 2110..... | IV, 92 |
| 2363..... | I, 356 |
| 3195..... | II, 47 |
| 3131..... | V, 132 |
| 3333..... | V, 223 |
| 3991..... | II, 41 |
| 4206..... | II, 415 |
| 4788..... | I, 45 |
| 4828..... | IV, 376 |
| 4972..... | II, 141 |
| 5303..... | V, 223 |
| 5320..... | IV, 93 |
| 5379..... | II, 76 |
| 5400..... | IV, 93 |
| 5552..... | II, 382 |
| 5776..... | II, 47 |
| 5847..... | III, 174 |
| 6168..... | I, 53 |
| 6225..... | I, 356 |
| 6671..... | V, 399 |
| 6994..... | II, 486 |
| 7933..... | I, 517; V, 132 |
| 8277..... | V, 223 |
| 10324 (G. A. 45)..... | I, 274; V, 182 |
| 10335..... | III, 309 |
| 10355..... | I, 390; II, 157 |
| 10414..... | IV, 282 |
| 10467..... | III, 67; IV, 126 |
| 10533..... | II, 265 |
| 10548..... | II, 259 |
| 10864..... | IV, 4 |
| 10877..... | V, 391 |
| 10910..... | IV, 339; V, 479 |
| 10937..... | IV, 136 |
| 11074..... | II, 287 |
| 11215..... | III, 317 |
| 11250..... | IV, 365 |
| 11572 (G. A. 747)..... | II, 491 |
| 11580 (G. A. 755)..... | I, 224 |
| 11586 (G. A. 761)..... | IV, 524 |

Treasury decisions cited in opinions—Con.

| | Volume and page. |
|-------------------------|---------------------|
| 11985..... | IV, 283 |
| 12103..... | IV, 339 |
| 12112 (G. A. 974)..... | I, 51 |
| 12124..... | III, 445 |
| 12316..... | V, 65 |
| 12343 (G. A. 1115)..... | I, 224 |
| 12350 (G. A. 1122)..... | I, 224 |
| 12353 (G. A. 1125)..... | II, 303 |
| 12356 (G. A. 1128)..... | II, 366; IV, 465 |
| 12458..... | II, 95 |
| 12564..... | V, 454 |
| 12566..... | V, 390 |
| 12663 (G. A. 1312)..... | III, 85 |
| 12730 (G. A. 1379)..... | II, 493 |
| 12793 (G. A. 1389)..... | II, 303 |
| 12814..... | IV, 307 |
| 12828 (G. A. 1434)..... | I, 322 |
| 12832 (G. A. 1428)..... | II, 114, 291 |
| 12919 (G. A. 1470)..... | II, 114, 291 |
| 12920..... | IV, 307 |
| 12953..... | II, 196 |
| 12957..... | V, 182 |
| 12977 (G. A. 1528)..... | II, 486 |
| 12979..... | IV, 283 |
| 12994..... | V, 409 |
| 13238..... | III, 207 |
| 13243..... | III, 100 |
| 13244 (G. A. 1665)..... | IV, 524 |
| 13307..... | III, 207 |
| 13483..... | V, 380 |
| 13594 (G. A. 1866)..... | II, 365 |
| 13677..... | IV, 376 |
| 13681..... | IV, 283 |
| 13916 (G. A. 2010)..... | I, 357 |
| 13964 (G. A. 2017)..... | I, 274 |
| 14559..... | III, 66 |
| 14634..... | V, 275 |
| 14691..... | III, 28, 49 |
| 14692 (G. A. 2414)..... | II, 365 |
| 14696 (G. A. 2418)..... | I, 224 |
| 14706..... | II, 236 |
| 14825..... | III, 427 |
| 14829..... | IV, 57 |
| 14938..... | II, 236 |
| 14969..... | I, 374 |
| 15026..... | III, 109 |
| 15081..... | I, 374 |
| 15476..... | III, 109 |
| 15479..... | I, 517 |
| 15577..... | III, 109 |
| 15631..... | I, 45 |
| 15716..... | V, 391 |
| 15723..... | III, 100 |
| 15724..... | III, 101 |
| 15726..... | V, 182 |
| 15825..... | II, 535 |
| 15866..... | V, 112 |
| 15961..... | IV, 33 |
| 16099 (G. A. 3063)..... | II, 486 |
| 16304 (G. A. 3133)..... | II, 486 |
| 16426..... | IV, 376 |
| 16577..... | II, 534 |
| 16584..... | III, 222 |
| 16806..... | IV, 57; V, 27 |

| | Volume and page. |
|---|---------------------------|
| Treasury decisions cited in opinions—Con. | |
| 16843..... | V, 166 |
| 16969..... | V, 494 |
| 16970..... | V, 87 |
| 16988..... | IV, 85 |
| 17158..... | IV, 45 |
| 17172 (G. A. 3489)..... | II, 377, 501 |
| 17373..... | II, 350 |
| 17623 (G. A. 3671)..... | I, 176 |
| 17638..... | III, 303 |
| 17639 (G. A. 3687)..... | II, 492 |
| 17644..... | II, 341 |
| 17728..... | III, 427 |
| 17744 (G. A. 3730)..... | II, 81 |
| 17750..... | V, 359 |
| 17756 (G. A. 3742)..... | IV, 136 |
| 17851..... | V, 376 |
| 17892..... | III, 4 |
| 17959..... | IV, 41 |
| 18078..... | III, 189 |
| 18083 (G. A. 3985)..... | I, 274 |
| 18090 (G. A. 3892)..... | II, 486 |
| 18233..... | III, 109 |
| 18508..... | I, 229 |
| 18617 (G. A. 4015)..... | III, 258 |
| 18627 (G. A. 4025)..... | II, 303 |
| 18739..... | V, 119 |
| 18837 (G. A. 4065)..... | II, 135 |
| 19098..... | II, 328 |
| 19123..... | II, 490 |
| 19130..... | III, 2 |
| 19136..... | V, 182 |
| 19156..... | IV, 80; V, 360 |
| 19263..... | I, 206 |
| 19454 (G. A. 4171)..... | II, 493 |
| 19528 (G. A. 4191)..... | II, 490, 493 |
| 19628..... | III, 222 |
| 19716 (G. A. 4215)..... | II, 135 |
| 19945..... | III, 322; IV, 340; V, 479 |
| 19946..... | III, 109 |
| 20038..... | V, 518 |
| 20047..... | V, 112 |
| 20129..... | V, 376 |
| 20214..... | V, 59 |
| 20244 (G. A. 4300)..... | I, 274 |
| 20298..... | IV, 69 |
| 20728..... | IV, 115 |
| 20925..... | IV, 512 |
| 21115..... | II, 516 |
| 21186..... | I, 455 |
| 21205..... | IV, 324 |
| 21234..... | III, 360 |
| 21320..... | III, 428 |
| 21327..... | IV, 377 |
| 21375..... | V, 221 |
| 21408..... | IV, 283 |
| 21425..... | IV, 283 |
| 21428 (G. A. 4503)..... | I, 330 |
| 21474..... | III, 104 |
| 21565..... | I, 455 |
| 21625..... | V, 87 |
| 21713..... | II, 47 |
| 21714 (G. A. 4585)..... | II, 493 |
| 21804 (G. A. 4606)..... | II, 494, 524; V, 349 |
| 21819 (G. A. 4611)..... | II, 82 |

| | Volume and page. |
|---|---------------------|
| Treasury decisions cited in opinions—Con. | |
| 21940 (G. A. 4639)..... | I, 78 |
| 21944..... | V, 275 |
| 21961..... | III, 67 |
| 21996..... | III, 322 |
| 22007..... | III, 369 |
| 22057 (G. A. 4665)..... | III, 85 |
| 22064..... | IV, 33 |
| 22143..... | V, 444 |
| 22163..... | IV, 33 |
| 22176 (G. A. 4703)..... | I, 176 |
| 22265..... | III, 263 |
| 22414 (G. A. 4743)..... | I, 343 |
| 22415 (G. A. 4744)..... | II, 53 |
| 22447..... | I, 465 |
| 22462..... | IV, 56 |
| 22469..... | IV, 57 |
| 22507..... | V, 376 |
| 22519..... | II, 269 |
| 22528..... | I, 363 |
| 22604 (G. A. 4808)..... | I, 75 |
| 22653..... | II, 501 |
| 22680..... | I, 363 |
| 22687..... | II, 417 |
| 22725..... | V, 420 |
| 22843..... | V, 106 |
| 22918..... | I, 372 |
| 23027..... | II, 93 |
| 23028..... | II, 94; V, 65 |
| 23030..... | III, 467 |
| 23130 (G. A. 4946)..... | I, 331, 332 |
| 23181 (G. A. 4847)..... | I, 153 |
| 23247 (G. A. 4981)..... | I, 274 |
| 23386 (G. A. 5035)..... | II, 328 |
| 23453..... | V, 354 |
| 23470 (G. A. 5062)..... | I, 225 |
| 23471..... | III, 29, 49 |
| 23473..... | I, 455 |
| 23503..... | II, 122 |
| 23557..... | II, 261 |
| 23563..... | III, 104 |
| 23640..... | V, 422 |
| 23655..... | V, 154 |
| 23657..... | V, 391 |
| 23794..... | II, 417 |
| 23871..... | V, 129 |
| 24002..... | V, 376 |
| 24013 (G. A. 5210)..... | II, 316 |
| 24151..... | IV, 144 |
| 24160..... | II, 417 |
| 24189..... | III, 96 |
| 24243..... | III, 264 |
| 24308..... | I, 221 |
| 24513 (G. A. 5361)..... | IV, 131 |
| 24514..... | II, 417 |
| 24547..... | II, 417 |
| 24601..... | V, 338 |
| 24604..... | IV, 307; V, 44 |
| 24663 (G. A. 5417)..... | II, 319 |
| 24677..... | II, 417 |
| 24082..... | V, 391 |
| 24715 (G. A. 5437)..... | II, 52 |
| 24723..... | III, 29, 50 |
| 24738..... | V, 132 |
| 24746 (G. A. 5457)..... | II, 175 |

| | Volume and page. |
|---|---------------------------|
| Treasury decisions cited in opinions—Con. | |
| 24778..... | III, 55 |
| 24803..... | V, 166 |
| 24808..... | IV, 85 |
| 24860..... | V, 494 |
| 24864..... | II, 93 |
| 24869 (G. A. 5526)..... | I, 528; III, 104 |
| 24883..... | II, 501 |
| 24912..... | III, 373 |
| 24971..... | I, 455 |
| 24991..... | II, 418 |
| 25022..... | V, 106 |
| 25023..... | I, 262 |
| 25037..... | III, 303 |
| 25038..... | III, 322; IV, 341; V, 480 |
| 25050..... | II, 287 |
| 25109..... | V, 106 |
| 25118..... | V, 106 |
| 25130..... | II, 438 |
| 25197..... | III, 303 |
| 25199..... | V, 488 |
| 25213..... | IV, 89; V, 298 |
| 25236..... | III, 478 |
| 25261..... | V, 392 |
| 25309..... | IV, 89 |
| 25311..... | IV, 89 |
| 25332 (G. A. 5690)..... | II, 308 |
| 25359 (G. A. 5701)..... | III, 20 |
| 25361 (Abstract 1800)..... | I, 357, 358 |
| 25376 (G. A. 5703)..... | II, 467 |
| 25381..... | II, 535 |
| 25384 (G. A. 5711)..... | I, 224 |
| 25409 (G. A. 5717)..... | IV, 402 |
| 25410..... | II, 287 |
| 25440..... | IV, 324 |
| 25443..... | V, 349 |
| 25457..... | III, 55 |
| 25499 (Abstract 2453)..... | II, 20 |
| 25510..... | I, 455 |
| 25733..... | II, 287 |
| 25735..... | V, 361 |
| 25764..... | II, 265; V, 53 |
| 25767..... | V, 129 |
| 25827..... | III, 29, 50 |
| 25832..... | IV, 86 |
| 25848..... | II, 202 |
| 25878..... | I, 225 |
| 25892 (G. A. 5899)..... | I, 68 |
| 25910..... | III, 320 |
| 25912..... | III, 373 |
| 25965 (G. A. 5891)..... | II, 335, 341 |
| 25991..... | I, 358 |
| 26007 (G. A. 5908)..... | I, 114 |
| 26030..... | III, 264 |
| 26041 (Abstract 3288)..... | I, 225 |
| 26149..... | III, 303 |
| 26150..... | V, 106 |
| 26086..... | II, 341 |
| 26152 (G. A. 5967)..... | I, 118 |
| 26187 (G. A. 5978)..... | I, 225 |
| 26312..... | I, 514 |
| 26319..... | III, 487 |
| 26338 (G. A. 6255)..... | IV, 106 |
| 26360..... | III, 56 |
| 26387 (G. A. 6052)..... | II, 381 |

| | Volume and page. |
|---|---------------------|
| Treasury decisions cited in opinions—Con. | |
| 26414..... | V, 150 |
| 26417 (Abstract 6822)..... | II, 284 |
| 26445 (G. A. 6063)..... | II, 329 |
| 26478..... | IV, 307; V, 411 |
| 26492..... | IV, 89 |
| 26507..... | IV, 89 |
| 26647..... | III, 303 |
| 26454..... | II, 236 |
| 26488..... | II, 342 |
| 26514..... | V, 17, 27 |
| 26559 (Abstract 7181)..... | II, 284 |
| 26613..... | V, 112 |
| 26646..... | V, 558 |
| 26658..... | V, 53 |
| 26664 (G. A. 6132)..... | IV, 288 |
| 26679..... | IV, 89 |
| 26681..... | IV, 90 |
| 26692 (G. A. 6147)..... | II, 45 |
| 26733 (G. A. 6159)..... | I, 253 |
| 26737..... | II, 309 |
| 26753..... | III, 323 |
| 26769 (G. A. 6166)..... | I, 343 |
| 26790 (G. A. 8503)..... | IV, 307 |
| 26856..... | V, 332 |
| 26866..... | I, 118 |
| 26888 (G. A. 6221)..... | III, 20 |
| 26898..... | V, 150 |
| 26914..... | IV, 90 |
| 26933..... | II, 418 |
| 26965..... | III, 401 |
| 26988..... | II, 417 |
| 26995 (G. A. 6253)..... | III, 516 |
| 27051..... | II, 287 |
| 27054 (G. A. 6272)..... | I, 105 |
| 27115..... | II, 287 |
| 27118..... | II, 97 |
| 27162 (G. A. 6303)..... | II, 494, 501 |
| 27209..... | V, 392 |
| 27278..... | V, 338 |
| 27289 (G. A. 6339)..... | I, 249 |
| 27328 (G. A. 6360)..... | I, 65 |
| 27360 (G. A. 6370)..... | II, 490, 495 |
| 27390..... | IV, 89 |
| 27426..... | V, 98 |
| 27442..... | V, 315 |
| 27501..... | II, 362 |
| 27536 (G. A. 6406)..... | I, 84 |
| 27541..... | IV, 324 |
| 27571..... | IV, 90 |
| 27572 (Abstract 12633)..... | II, 175 |
| 27633 (G. A. 6449)..... | I, 33 |
| 27645..... | II, 293 |
| 27680 (G. A. 6468)..... | IV, 288 |
| 27682 (G. A. 6470)..... | I, 263 |
| 27716 (G. A. 6479)..... | IV, 371 |
| 27744 (G. A. 6488)..... | IV, 432 |
| 27760 (G. A. 6490)..... | I, 36 |
| 27769..... | IV, 504 |
| 27773..... | III, 403 |
| 27785 (Abstract 13754)..... | II, 440; IV, 45 |
| 27791 (G. A. 6503)..... | II, 381 |
| 27793 (G. A. 6505)..... | II, 319 |
| 27866..... | II, 366 |
| 27871 (G. A. 6531)..... | I, 345 |

| | Volume and page. | | Volume and page |
|---|---------------------------|---|---|
| Treasury decisions cited in opinions—Con. | | Treasury decisions cited in opinions—Con. | |
| 27888..... | II, 114 | 30023..... | III, 199, 266; IV, 256 |
| 27891..... | I, 509 | 30046..... | I, 309 |
| 27949..... | II, 362 | 30048 (Abstract 21933)..... | IV, 385 |
| 27962..... | V, 376 | 30085..... | III, 446 |
| 27971 (G. A. 6503)..... | I, 199 | 30122 (Abstract 22664)..... | IV, 45 |
| 28018 (G. A. 6560)..... | I, 105 | 30266..... | IV, 22 |
| 28044 (G. A. 6567)..... | I, 36 | 30272..... | V, 69 |
| 28070..... | V, 103 | 30364 (Abstract 22738)..... | IV, 386 |
| 28170..... | II, 188 | 30442..... | V, 276 |
| 28181..... | V, 276 | 30444 (G. A. 6995)..... | II, 283 |
| 28205..... | III, 401 | 30506..... | III, 254 |
| 28215..... | III, 161 | 30528 (G. A. 7007)..... | I, 305 |
| 28217 (G. A. 6606)..... | I, 89; V, 106, 109 | 30529 (Abstract 23020)..... | IV, 294 |
| 28223 (Abstract 15614)..... | IV, 89 | 30543..... | V, 76, 148 |
| 28249..... | V, 157 | 30573..... | IV, 131 |
| 28258 (Abstract 15701)..... | IV, 89 | 30612 (G. A. 7119)..... | II, 284 |
| 28276..... | V, 411 | 30644..... | II, 58 |
| 28278 (Abstract 15899)..... | IV, 432 | 30764..... | II, 179 |
| 28291 (G. A. 6633)..... | I, 103 | 30770..... | I, 121; II, 103 |
| 28294 (G. A. 6636)..... | I, 21 | 30772..... | I, 145 |
| 28298 (G. A. 6640)..... | I, 253 | 30776..... | I, 211, 284, 515, 529; II, 109; III, 13 |
| 28384..... | V, 107, 109 | 30791..... | II, 535 |
| 28409..... | V, 392 | 30826 (G. A. 7078)..... | II, 52, 53, 227 |
| 28423..... | II, 344 | 30848..... | II, 3, 139 |
| 28425..... | II, 94 | 30850..... | I, 361 |
| 28511..... | II, 233 | 30932 (G. A. 7100)..... | IV, 395 |
| 28519..... | I, 93 | 30936..... | II, 260; IV, 265 |
| 28539..... | I, 97 | 30944..... | IV, 94 |
| 28576..... | III, 516 | 31006..... | II, 477 |
| 28716..... | II, 362 | 31008..... | I, 140 |
| 28721..... | I, 404 | 31017..... | III, 29; IV, 68 |
| 28768..... | I, 517; V, 132 | 31033..... | I, 207; III, 57 |
| 28796..... | II, 251, 260 | 31034..... | I, 419 |
| 28814..... | IV, 289 | 31107..... | III, 60 |
| 28833..... | I, 490 | 31110..... | II, 205, 368, 438 |
| 28863..... | I, 153 | 31114..... | I, 418 |
| 28924..... | IV, 86 | 31115..... | II, 386, 454 |
| 28966..... | II, 107; III, 323; V, 480 | 31116..... | I, 145 |
| 29010..... | I, 153 | 31120..... | II, 484 |
| 29056..... | V, 245 | 31180..... | V, 476 |
| 29147..... | III, 121 | 31185..... | II, 407 |
| 29150..... | I, 133 | 31187..... | I, 541 |
| 29173 (Abstract 19419)..... | V, 98 | 31210..... | II, 32, 58, 64 |
| 29264..... | IV, 86 | 31213..... | II, 456 |
| 29369..... | V, 454 | 31216..... | II, 457 |
| 29512 (G. A. 6859)..... | I, 94 | 31217..... | II, 244, 359; III, 8 |
| 29519..... | III, 183 | 31218..... | I, 417 |
| 29559 (Abstract 20677)..... | IV, 417 | 31219..... | II, 385 |
| 29566..... | I, 536 | 31237..... | II, 432 |
| 29577..... | II, 114 | 31239..... | II, 465; III, 57 |
| 29600..... | II, 470 | 31258..... | II, 239 |
| 29687..... | V, 108 | 31263..... | III, 311; IV, 61, 263 |
| 29696..... | I, 536 | 31271..... | III, 107, 109 |
| 29763 (Abstract 21245)..... | II, 94 | 31273..... | I, 417 |
| 29773..... | V, 494 | 31277..... | I, 464 |
| 29801..... | V, 454 | 31301..... | II, 96 |
| 29877..... | V, 447 | 31314..... | V, 369 |
| 29922..... | II, 287 | 31316 (Abstract 24859)..... | IV, 104 |
| 29929..... | III, 294; V, 285 | 31317..... | II, 109, 277; III, 13 |
| 29939..... | V, 437 | 31320..... | II, 455 |
| 29958..... | III, 147, 385; IV, 60 | 31331 (G. A. 7174)..... | III, 125 |
| 29993..... | I, 309 | 31335 (Abstract 24880)..... | IV, 238 |
| 29980..... | III, 65 | 31354..... | II, 539; III, 4 |
| 29996 (G. A. 6931)..... | IV, 28, 499 | 31357..... | II, 383 |

| | Volume and page. | | Volume and page. |
|--|---------------------|--|----------------------|
| Treasury decisions cited in opinions—Con. | | Treasury decisions cited in opinions—Con. | |
| 31358..... | II, 474 | 33312..... | V, 42 |
| 31408..... | II, 339 | 34178..... | V, 543 |
| 31409..... | II, 239 | Treaties: | |
| 31430..... | II, 455 | Favored-nation clause in, effect of..... | I, 426; |
| 31432..... | II, 385 | | IV, 146, 186 |
| 31483..... | III, 2 | When provisions of are self-execut- | |
| 31434..... | II, 428, 438 | ing..... | IV, 140, 186 |
| 31435..... | II, 275 | Trimmed straw hats a specific provi- | |
| 31453..... | II, 464 | sion..... | III, 322; V, 312 |
| 31454..... | II, 457 | Trimmings— | |
| 31457..... | II, 385 | And bindings distinguished..... | III, 470 |
| 31482..... | II, 359 | And galloons, not ribbons..... | II, 43 |
| 31498 (Abstract 26312)..... | IV, 386 | Trophies or prizes; cases reviewed..... | III, 490 |
| 31499..... | II, 477 | Tube and pipe distinguished..... | II, 221 |
| 31506..... | II, 284, 409 | Twilled fabrics are not "plain woven"..... | II, 327 |
| 31508..... | I, 478 | Type metal produced in bonded smelter..... | II, 231 |
| 31526..... | II, 155 | Ultramarine blue, certain blue powder not. | I, 19 |
| 31527..... | II, 154 | Umeboshi and umezuki as fruits in brine.. | V, 159 |
| 31531..... | II, 139 | Undervaluation, goods in excess..... | II, 278 |
| 31543..... | II, 160 | Upholstery goods a commercial term..... | III, 115 |
| 31544..... | II, 497 | Use: | |
| 31552..... | II, 95 | Actual, as test for classification..... | IV, 110 |
| 31599..... | II, 139 | Article must show susceptibility for... I, 494; | |
| 31573..... | II, 38, 420 | | III, 72, 486; V, 485 |
| 31574..... | II, 38, 420 | Chief, jute manufacturing machinery... III, 436 | |
| 31577..... | II, 58 | Common and general need not be chief... V, 114 | |
| 31590..... | II, 420 | Common, evidence as to... I, 122; II, 483; III, 498 | |
| 31628..... | II, 477 | Designation based on, but article actu- | |
| 31656..... | II, 455 | ally used for other purposes... I, 497; III, 436 | |
| 31657..... | II, 331 | Designation based on, essentials..... I, 494, 497 | |
| 31662..... | II, 273 | Determined by article itself..... I, 334 | |
| 31676..... | II, 357 | Determines classification, if common or | |
| 31677..... | III, 89 | general..... I, 194; II, 512 | |
| 31679..... | II, 524 | "Fit only for" means in a commercial | |
| 31699..... | IV, 256, 258 | sense..... I, 122, 513; IV, 47; V, 28 | |
| 31713..... | III, 386 | In this country determines classifica- | |
| 31771..... | IV, 376 | tion..... III, 498 | |
| 31788 (Abstract 26277)..... | IV, 4 | Incidental does not determine classifica- | |
| 31854..... | V, 517 | tion..... III, 306 | |
| 31945..... | II, 460 | Rare and exceptional does not govern | |
| 31962..... | IV, 137 | classification..... II, 206 | |
| 31973..... | II, 253, 539 | Readiness for, as a test of "finished".... I, 379 | |
| 31974..... | II, 398 | Substantial not exclusive, determines | |
| 31975..... | II, 246, 539 | classification..... IV, 301 | |
| 32002..... | V, 141 | "Suitable for" means commercially | |
| 32030 (G. A. 7302)..... | IV, 132 | fit..... III, 83, 306 | |
| 32041..... | II, 461 | Unfinished articles, how determined... IV, 438, | |
| 32068..... | III, 173 | | 470; V, 226 |
| 32078..... | II, 409 | Utensils, articles to be fixed in place are not. | V, 61 |
| 32091..... | III, 7 | Value: | |
| 32112..... | II, 454 | Chief, how component material of de- | |
| 32138..... | V, 133 | termined..... II, 143 | |
| 32149 (Abstract 27540)..... | IV, 28 | Consular and pro forma invoice differ- | |
| 32171..... | II, 490 | ing..... II, 239, 249; III, 256 | |
| 32378..... | V, 28 | Dutiable, goods dutiable at rates de- | |
| 32454 (G. A. 7357)..... | IV, 450 | pendent on value..... IV, 54 | |
| 32511..... | IV, 256, 258 | Entered, duty must be assessed on. I, 61; V, 137 | |
| 32617..... | V, 107 | Entered, effect of duress on... I, 36, 478; III, 343 | |
| 32728..... | IV, 27 | Figured cotton cloth..... II, 215 | |
| 32760 (Abstract 29504)..... | IV, 266 | Market— | |
| 32830 (Abstract 29624)..... | IV, 294 | Allowance for cash discount..... V, 204 | |
| 32926..... | V, 103 | Compound-duty goods; coverings... III, 327 | |
| 32958..... | V, 119 | Cost of shrinking woolen cloth..... V, 432 | |
| 33143..... | V, 126 | | |

- Value—Continued.**
- Market—Continued.**
- Definition of term..... III, 327; IV, 54
- Seller's commission as part of..... V, 447
- What is date of exportation..... I, 290
- Woolen cloth in tailors' lengths..... V, 121
- Vases as sculptures..... II, 321; III, 124
- Vegetable—**
- Fibers cut in uniform lengths are dressed..... V, 491
- Bunched are not crude..... V, 210
- Substances—**
- Birch bark not ejusdem generis with..... V, 95
- Legislation and litigation reviewed..... V, 95
- Pine cones containing nuts, not.... V, 516
- Tallow not used for soap making..... IV, 81
- Vegetables:**
- Articles eaten as condiments not..... I, 171; II, 342; IV, 142, 145
- Canned tomatoes not, in their natural state..... I, 237
- Canned, water in is part of dutiable weight..... V, 167
- Claim of similarity to, must show to which..... IV, 129
- Common and commercial understanding of..... IV, 313
- Horse-radish not..... IV, 142, 145
- Melon seeds are not..... II, 388
- Mushrooms in undivided packages..... II, 274
- Pickles must be made from... I, 171; II, 342, 408
- Prepared—
- Dried and salted cabbage..... I, 17
- Soup tablets as..... V, 32
- Tomato paste as..... IV, 75
- Yams, so called, dutiable as..... I, 14
- Veils and mufflers distinguished..... IV, 3
- Velvet:**
- Or velour, partly pile surface..... III, 301
- Waterproof, as waterproof cloth and not as velvet..... V, 215
- Vessels, racing shells are not..... II, 526
- Waiver, definition and scope of..... IV, 308, 404**
- Wall pockets, lithographed, as manufactures of paper..... I, 422
- Walnuts:**
- Pickled. (*See* Pickled walnuts.)
- Pieces of, as shelled walnuts..... II, 457
- Wantage in casks of ale; allowance for..... III, 291
- Washers, nut locks held to be..... III, 77
- Waste:**
- Articles made from, not classifiable as. V, 499
- Bagging free as rags..... II, 456; III, 52
- Clippings of fur skins not..... I, 198
- Cotton. (*See* Cotton waste.)
- Definitions and distinctions..... I, 246; II, 431
- Jute card, held free as jute undressed.... II, 431
- Metal parings and shavings not..... II, 311
- Watch:**
- Compasses are not parts of jewelry..... V, 382
- Jewels, reconstructed rubies as..... V, 336
- Watches and watch movements; cases reviewed..... IV, 105
- Watchmen's time detectors, act of 1909..... IV, 105
- Water, mineral. (*See* Mineral water.)
- Waterproof:**
- Cloth not in chief value of cotton.... IV, 228, 344
- Velvet dutiable as waterproof cloth..... V, 215
- Wax:**
- Diminutive fruits made of, are not artificial fruit..... IV, 384
- May be animal, vegetable, or mineral in origin..... IV, 506
- Wearing apparel:**
- Boleros dutiable as..... I, 92
- Children's ear caps not..... I, 49
- Collars are..... I, 92, 168
- Ear caps not..... I, 49
- Hair rolls, "rats" as..... I, 170
- Trimmed with Lever lace..... V, 170
- Wool; legislation and litigation reviewed..... V, 261
- Weigher:**
- Collector is bound by return of. IV, 519; V, 127
- Collector not bound by return of in case of fraud..... V, 151
- May weigh ad valorem goods to determine rate..... IV, 519; V, 127
- Weighing legal if necessary to determine rate of duty..... IV, 519; V, 127
- Weight:**
- Ascertained by appraising officers. I, 439; III, 447
- Dutiable, appliqué silk fabrics..... I, 297
- Dutiable, of sugar is landed weight..... II, 116
- Dutiable, trade custom held to govern..... II, 227
- Official return of, correct..... I, 439
- Westrumite asphalt as advanced..... I, 400
- Wharves, timber for, unpeeled logs not.... V, 114
- Wheat:**
- Boiled and ground, a nonenumerated manufactured article..... I, 437
- Damaged by frost is dutiable as wheat.. V, 465
- Damaged by heat is dutiable as wheat.. V, 472
- Feed wheat is commercial wheat..... V, 472
- Graded "no grade" is dutiable as wheat..... V, 465, 472
- Whiting, polishing powder as similar to..... III, 363; IV, 433, 437
- Wicker-covered bottles are not plain glass bottles..... IV, 496
- Willow baskets are baskets of wood..... II, 15, 17
- Wine containing in excess of 14 per cent of alcohol..... II, 177
- Wire:**
- Coiled, is a manufacture of wire..... V, 43
- Nickel and platinum, is not platinum wire..... IV, 398
- Paragraph, act of 1909, construed..... III, 459; IV, 396, 420
- Ribbon, as an article made from wire... IV, 420
- Rods, definitions and essentials of..... I, 494
- Weighing necessary to determine rate is legal..... IV, 519; V, 127
- Woman, married, determination of residence..... IV, 414; V, 341
- Wood:**
- Articles "of" may include those in chief value of silk..... II, 419; III, 488
- Cabinet, ash, oak, and poplar are not... IV, 449
- Cedar, not limited to cabinet variety... IV, 480
- Cut from Canadian Crown lands; export restricted..... V, 235

| | Volume and page. | | Volume and page. |
|--|-----------------------|---|--------------------------------|
| Wood—Continued. | | Words and phrases—Continued. | |
| Dyewoods cut or shredded..... | II, 374 | "In part of"..... | IV, 298 |
| Flour is a manufacture of flour..... | IV, 464 | "Hyacinth"..... | II, 26 |
| Liberal construction of free lumber provision..... | V, 541 | "Jewelry"..... | IV, 89 |
| Mill buttings as firewood..... | V, 102 | "Knitted"..... | III, 368 |
| Pulp, Canadian, act of 1911..... | IV, 146, 186 | "Made up" into articles..... | IV, 304; V, 362 |
| Pulp from Canada, made from Crown lands wood..... | V, 235, 519 | "Manifest"..... | IV, 225 |
| Pulp made in one country from wood grown in another..... | V, 366 | May have different meanings in differ- ent statutes..... | I, 146 |
| Telephone poles peeled but not notched | IV, 431 | "Medicinal preparations"..... | IV, 17 |
| Timber included hoop poles..... | V, 79 | "Mixtures"..... | II, 285 |
| Unpeeled logs not timber for wharves.. | V, 114 | "Muffler"..... | IV, 3 |
| Working machinery not machine tools. | III, 410 | "Of wood" may include articles in chief value of silk..... | II, 371, 419; III, 488; V, 327 |
| Wool: | | "Or" as a word of extension..... | II, 371 |
| Cattle hair goods—similitude..... | II, 389 | "Or otherwise"..... | IV, 227 |
| China goat hair not dutiable as..... | V, 500 | "Or parts thereof"..... | II, 9 |
| Cloths in part of, more specific than manufactures of india rubber..... | III, 161 | "Other," varied uses of..... | II, 95, 149; III, 115; IV, 480 |
| Grease—adeps lane as (1909)..... | III, 316 | "Otherwise"..... | IV, 226 |
| On the skin, classification of..... | I, 272 | "Owner" of antiques..... | IV, 262 |
| Wearing apparel in part of; legislation and litigation reviewed..... | V, 261 | "Permanently fitted"..... | V, 249 |
| Woolen cloths: | | "Pickles"..... | II, 344 |
| Charges for shrinking..... | V, 432 | "Plasmon"..... | II, 292 |
| Dress goods—"five per centum less duty"..... | II, 481 | "Plate"..... | I, 6, 31, 172 |
| Words and phrases..... | IV, 69 | "Porcelain"..... | IV, 462 |
| "Appliqued"..... | V, 217 | "Reasons" and "grounds"..... | I, 64 |
| "Baskets"..... | II, 419; IV, 516 | "Re-reappraisalment"..... | IV, 306 |
| "Bolted off" and "in the gum"..... | I, 346 | "Returning"..... | V, 341 |
| "Cabinet woods"..... | IV, 480 | "Rough leather"..... | I, 379 |
| "Charts"..... | IV, 42 | "Sculpture"..... | II, 321 |
| "Clear"..... | II, 444 | "Set"..... | IV, 274 |
| "Coating" does not include welding.... | II, 162 | "Sheets"..... | IV, 245 |
| "Colored"..... | II, 78 | "Sides" of lumber..... | II, 123 |
| "Composed" does not necessarily im- ply two materials..... | II, 425 | "Split" leather..... | II, 270 |
| "Composed of"..... | IV, 345 | "Such as"..... | IV, 285 |
| "Contained"..... | V, 532 | "Suitable"..... | II, 206 |
| "Cord"..... | IV, 77 | "Tape"..... | V, 111 |
| "Cords"..... | IV, 338 | "To make up"..... | IV, 304 |
| "Country"..... | I, 443 | "Toys"..... | I, 109; IV, 10 |
| "Crude"..... | II, 485, 522; IV, 134 | "Traveling sets"..... | IV, 277 |
| "Cut leather"..... | II, 83 | "Trimmings"..... | II, 43 |
| "Derived from"..... | IV, 113 | "Vegetables"..... | IV, 142 |
| "Drawplate"..... | II, 6 | "Vessels"..... | II, 526 |
| "Embossing"..... | II, 347 | "Wax"..... | IV, 506 |
| "Fancy"..... | IV, 66; V, 77 | "Wrought" and "unwrought"..... | I, 158 |
| "Fancy" as applied to soap..... | I, 500 | (See Construction.) | |
| "Finished," readiness for use as a test. | I, 379 | Wortles, steel, as forgings..... | II, 4 |
| "Fit only for such use"..... | I, 513; IV, 47 | Woven fabrics, plain and twilled..... | II, 327 |
| "Five per centum" means same as "one-twentieth"..... | II, 481 | Wreaths not classifiable as flowers... I, 337; II, 427 | |
| "Form" as applied to artificial silk yarn..... | II, 395 | Writs of error distinguished from appeals.. | IV, 422 |
| "French chalk"..... | II, 93 | Wrought by hand—statue of ivory and cast metal..... | III, 168 |
| "Gaufrage"..... | II, 80 | Yams, Chinese roots held free as..... | I, 14 |
| "Goods" and "material"..... | V, 170 | Yarn: | |
| "Grain" leather..... | II, 270 | Coated cotton, as artificial horsehair... III, 75 | |
| "In brine"..... | IV, 98 | Schappe silk, conditioned, weight gov- erns..... | II, 227 |
| "Including" as a word of extension.... | II, 172 | Yellow earthenware. (See Common yel- low.) | |
| "Indigo extracts or pastes"..... | IV, 510 | Zinc: | |
| "Individuals" in par. 517, Ta. 1909.... | II, 528 | Enameled tiles not zinc in sheets..... | II, 137 |
| | | Ore containing lead..... | I, 472 |
| | | Paint contain'g. (See Paint.) | |

